SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 629.

JAMES DONNELLY, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

INDEX.

	Original.	Print.
Indictment	1	1
Order remitting record to United States Circuit Court	4	2
Certificate of clerk of United States District Court	5	3
Bench warrant	6	3
Marshal's return	7	4
Order of arraignment	8	5
Order of trial February 3, 1910	9	5
February 4, 1910	11	6
February 8, 1910	13	7
February 9, 1910	14	8
February 10, 1910	15	8
February 11, 1910	16	9
Verdict	18	10
Judgment	20	11
Certificate to judgment roll	22	11
Bill of exceptions	23	12
Evidence for the Government	23	12
Testimony of James Masten	23	12
Seeley Griffin	25	13
Henry Griffin	26	14
Ira Stevens	33	19
James Minol	35	20
Albert Nixon	36	20
John A. Prentice	38	22
James Masten (recalled)	38	22
Government rests	39	22

	Original.	Print.
Bill of exceptions—Continued.		
Motion to dismiss (denied)	39	22
Further evidence for the Government.	39	22
Testimony of James Masten (recalled)	39	22
Evidence for the defendant.	40	23
Testimony of Warren Hancorn	40	23
Rosa Jackson	41	23
Lulu Donnelly	43	25
Shleghorn Jim	45	26
W. H. Lawson	47	27
Charles Stevens	47	28
James Donnelly	50	29
William Norris	59	35
Catherine Goodwin	61	36
James Donnelly (recalled)	62	37
Naturalization papers offered	62	37
Maps offered	63	37
Mining location	63	38
Orders of board of supervisors offered.	64	38
Field notes of survey offered	64	38
Evidence for Government in rebuttal	65	38
Testimony of James Masten (recalled)	65	38
Paul Smith	66	39
John Bigfire	67	40
Milton J. Thompson	68	41
Lucy Thompson	70	42
Evidence for defendant in rebuttal	70	42
Testimony of F. W. Taft	70	42
James Donnelly (recalled)	71	42
Instructions to the jury	72	43
Defendant's requests for instructions	84	50
Exceptions to instructions	85	51
Order granting time to prepare bill of exceptions	85	51
Motion for new trial	86	52
Affidavit of Henry George	86	52
Charles Mack	87	53
James Donnelly	88	53
J. F. Quinn	91	54
Motion in arrest of judgment	92	55
Stipulation as to time to prepare bill of exceptions	92	55
Stipulation as to time to petition for writ of error	93	56
Rule 75 of Circuit Court	93	56
Specification of particulars in which the evidence is insufficient	94	56
Agreement as to bill of exceptions	95	57
Judge's certificate to bill of exceptions	95	57
Stipulation and order extending time to file bill of exceptions	95a	58
Stipulation and order extending time to sue out writ of error	95b	58
Petition for writ of error	96	59
Assignment of errors	97	60
Order allowing writ of error	101	62
Clerk's certificate	102	63
Writ of error and return	103	63
Citation and service	104	65

1

Indictment.

In the District Court of the United States in and for the Northern District of California.

At the stated term of said court begun and holden at the city and county of San Francisco, within and for the State and Northern District of California, on the second Monday of July, in the year of our Lord one thousand nine hundred and nine,

The grand jurors of the United States of America, within and for the district aforesaid, on their oath present:

That James Donnelly, late of the Northern District of California, heretofore, to wit, on the first day of October, in the year of our Lord one thousand nine hundred and two, with force and arms within the limits of a certain Indian reservation commonly known as and called the extension of the Hoopa Valley Reservation, in the county of Humboldt, in the State and Northern District of California, and within the jurisdiction of this honorable court then and there being, in and upon one "Chickasaw," an Indian, a human being, then and there being within the limits of said Indian reservation at the time and place aforesaid, feloniously, wilfully, unlawfully, and of his malice aforethought, did make an assault; and that the said James Donnelly, a certain gun which was then and there loaded and charged with gunpowder and a leaden bullet, which said gun he, the said James Donnelly, in his hands then and there had and held at and against the body of him, the said "Chickasaw," an Indian then and there being as aforesaid, then and there feloniously, wilfully, and of his malice aforethought, did shoot off and discharge, and that

2 the said James Donnelly then and there with the leaden bullet aforesaid, then and there shot off and discharged and sent forth as aforesaid, him, the said "Chickasaw," an Indian, then and there being as aforesaid, in and upon the back part of the body of him, the said "Chickasaw," an Indian, then and there feloniously, wilfully, and of his malice aforethought, did strike, penetrate, and wound, and did then and there in the manner, and by the means aforesaid, give to him, the said "Chickasaw," an Indian, with the leaden bullet aforesaid, so shot off, discharged, and sent forth as aforesaid, one mortal wound, the width and depth of which said wound is to the grand jurors aforesaid unknown, of which said mortal wound the said "Chickasaw," an Indian, within the limits of the said Indian reservation commonly known as and called the extension of the Hoopa Valley Reservation, in the county of Humboldt, in the State and Northern District of California, and within the jurisdiction of this honorable court, then and there, to wit, on the said first day of October, in the year of our Lord one thousand nine hundred and two, died.

And the grand jurors aforesaid, on their oath aforesaid, do say and represent that the said James Donnelly feloniously, wilfully,

and of his malice aforethought, him, the said "Chickasaw," an Indian, did then and there in the manner and form aforesaid kill and murder,

Against the peace and dignity of the United States of America, and contrary to the form of the statute of the said United States of America, in such case made and provided.

ROBT. T. DEVLIN,
United States Attorney.

3 Names of witnesses examined before the grand jury: John G. Dolson, John A. Prentice, James Masten, Henry Griffin, James Donnelly, William Masten, Joe Minol.

(Endorsed:) No. 4717. United States District Court, Northern District of California. The United States vs. James Donnelly. Indictment for murder. A true bill. A. P. Redding, foreman grand jury. Presented in open court and filed Oct. 26, 1909. Jas. P. Brown, clerk. By Frances Krull, deputy clerk. Robt. T. Devlin, U. S. attorney.

4 *Order remitting record to Circuit Court.*

At a stated term of the District Court of the United States of America for the Northern District of California, held at the court-room thereof, in the city and county of San Francisco, on Tuesday, the 26th day of October, in the year of our Lord one thousand nine hundred and nine.

Present: the Honorable John J. De Haven, judge.

THE UNITED STATES OF AMERICA
vs.
JAMES DONNELLY. } No. ——.

On motion of A. P. Black, assistant United States attorney, it is by the court now here ordered that the indictment found against the defendant above named, now on file in this court, be remitted to the next session of the Circuit Court of the United States, Northern District of California, Ninth Circuit, for trial.

I hereby certify that the foregoing is a full, true and correct copy of an original order made and entered in the above-entitled case.

Attest my hand and seal of said District Court this 26th day of October, A. D. 1909.

[SEAL.]

JAS. P. BROWN, *Clerk.*
By FRANCIS KRULL, *Deputy Clerk.*

5 In the District Court of the United States in and for the Northern District of California.

UNITED STATES OF AMERICA
vs.
JAMES DONNELLY. } No. 4717.

Certificate of clerk to remitted record.

I, Jas. P. Brown, clerk of the District Court of the United States for the Northern District of California, do hereby certify that at a stated term of the United States District Court for the Northern District of California, to wit, the July, 1909, term thereof, it was by the said court ordered that the indictment, No. 4717, found against the defendant above named, be remitted to the next session of the United States Circuit Court for the Ninth Circuit and Northern District of California, and in pursuance to said order I do hereby certify the annexed indictment to be an original indictment found against said defendant above named, and I do present the same to the said Circuit Court of the United States for the Ninth Circuit and Northern District of California.

In witness whereof I have hereunto set my hand and affixed the seal of the said District Court this twenty-sixth day of October, A. D. 1909.

[SEAL.] JAS. P. BROWN,
Clerk U. S. District Court Northern District of California.
By FRANCES KRULL,
Deputy Clerk.

(Endorsed:) Filed October 27th, 1909. Southard Hoffman, clerk By W. B. Maling, deputy clerk.

6 *Bench warrant.*

UNITED STATES OF AMERICA,
Northern District of California, ss:

To the marshal of the United States of America for the Northern District of California, and his deputies, or any or either of them, greeting:

Whereas, at a District Court of the United States of America for the Northern District of California, begun and held at the city and county of San Francisco, within and for the district aforesaid, on the 26th day of October in the year of our Lord one thousand nine hundred and nine, the grand jurors in and for the said district brought into the said court a true bill of indictment against James Donnelly for murder on Indian reservation, in violation of section 5339 of the Revised Statutes of the United States as by the said indictment, now remaining on file and of record in the Circuit Court

of the United States of America for the Ninth Judicial Circuit, in and for the Northern District of California, will fully and at large appear; and whereas, on the 26th day of October, in the year of our Lord one thousand nine hundred and nine, on motion of A. P. Black, assistant United States attorney, it was by the District Court of the United States of America for the Northern District of California ordered that the indictment found against the said defendant, James Donnelly, on file in said District Court, be remitted to the next session of the Circuit Court of the United States for the Ninth Judicial Circuit in and for the Northern District of California, for trial; to which indictment the said James Donnelly has not yet appeared or pleaded:

Now, therefore, you are hereby commanded in the name of the President of the United States of America, to apprehend the said James Donnelly, and him bring before the said United States Circuit Court, in its court room in the United States post-office and court-house building, situate on the northeast corner of Seventh and Mission streets, in the city and county of San Francisco, State of California, to answer the indictment aforesaid.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, and the seal of said Circuit Court, this 27th day of October, in the year of our Lord one thousand nine hundred and nine, and of our Independence the 134th.

[SEAL.] SOUTHARD HOFFMAN, *Clerk.*
By W. B. MALING, *Deputy Clerk.*

7 UNITED STATES MARSHAL'S OFFICE,
United States of America, Northern District of California.

In obedience to the warrant, I have the body of the said James Donnelly before the honorable the Circuit Court of the United States, in and for the Northern District of California, this 28th day of October, A. D. 1909.

Arrested in San Francisco the 27th day of October, 1909.

C. T. ELLIOTT, *U. S. Marshal,*
By PAUL J. ARNERICH,
Deputy U. S. Marshal.

(Endorsed:) Filed Oct. 28, 1909. Southard Hoffmann, clerk. By W. B. Maling, deputy clerk.

8 At a stated term, to wit, the November term, A. D. 1909, of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Northern District of California, held at the court room in the city and county of San Francisco, on Wednesday the 22nd day of December, in the year of our Lord one thousand nine hundred and nine.

Present: The Honorable William C. Van Fleet, district judge.

THE UNITED STATES vs. JAMES DONNELLY. } No. 2186. Criminal.

Order of arraignment.

And now on this day the defendant, James Donnelly, being present in open court, in his own proper person and with his atto , J. F. Quinn, esq., it was ordered, upon motion of A. P. Black, assistant United States attorney, that said defendant be arraigned to plead to the indictment herein; and said defendant was called to the bar and being asked what was his full, true, and correct name he answered that it was "James Donnelly." Thereupon said defendant was duly arraigned upon the indictment against him for the crime of murder to which said indictment the said defendant, in his own person, then and there pleaded "not guilty," and it was ordered that said plea be entered of record. And it was further ordered that this case be and is hereby set for trial upon Tuesday, February 1, 1910, at 10 o'clock a. m., and that the defendant be produced in court by the marshal at that time.

9 At a stated term, to wit, the November term, A. D. 1909, of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Northern District of California, held at the court room in the city and county of San Francisco, on Thursday, the 3rd day of February, in the year of our Lord one thousand nine hundred and ten.

Present: The Honorable William C. Van Fleet, district judge.

THE UNITED STATES vs. JAMES DONNELLY. } No. 2186. Criminal.

Order of trial February 3, 1910.

In this case the defendant, James Donnelly, being present in his own proper person and with his attorney, J. F. Quinn, esq., A. P. Black, assistant United States attorney, being also present; now on motion of Mr. Black it is ordered that the trial hereof do now proceed. The court proceeded to impanel a jury to try this case, as follows: John Connor, being sworn and examined, was accepted and sworn as a juror to try this case; Frank S. Kelly, being sworn and examined, was accepted and sworn as a juror to try this case; John H. Claasen, being sworn and examined, was accepted as a juror to try this case; Augustus Benard, being sworn and examined, was challenged peremptorily by the defendant, and said juror was excused; H. C. Macaulay, being sworn and examined, was accepted and sworn as a juror to try this case; Ranson E. Beach, being sworn and

examined, was accepted and sworn as a juror to try this case; Fred Meyer, being sworn and examined, was accepted and sworn as a juror to try this case; Charles R. Nauert, being sworn and
10 examined, was accepted and sworn as a juror to try this case; Richard Campbell, being sworn and examined, was challenged peremptorily by the Government, and said juror was excused; George Hotte, being sworn and examined, was challenged peremptorily by the defendant, and said juror was excused; Charles Trautner, being sworn and examined, was accepted and sworn as a juror to try this case; W. H. Carr, being sworn and examined, was accepted and sworn as a juror to try this case; George U. Hind, being sworn and examined, was accepted and sworn as a juror to try this case; Charles S. Fletcher, being sworn and examined, was challenged peremptorily by the defendant, and said juror was excused; Charles McCrystle, being sworn and examined, was accepted and sworn as a juror to try this case; Paul T. Carroll, being sworn and examined, was challenged peremptorily by the defendant, and said juror was excused; Thomas Wilson, being sworn and examined, was accepted and sworn as a juror to try this case. Thereupon the jury was complete and composed of the following named twelve persons, to wit: John Connor, Frank S. Kelly, John H. Claasen, H. C. Macaulay, Ranson E. Beach, Fred Meyer, Charles R. Nauert, Charles Trautner, W. H. Carr, George U. Hind, Charles McCrystle, and Thomas Wilson. Mr. Black stated the case of the Government to the court and jury and called James Masten, who was duly sworn and examined as a witness on behalf of the United States. And pending the examination of James Masten the further trial hereof was ordered continued until to-morrow morning at 10 o'clock; and the jury, after being duly admonished by the court, were excused until that time.

11 At a stated term, to wit, the November term, A. D. 1909, of the Circuit Court of the United States of America of the Ninth Judicial Circuit, in and for the Northern District of California, held at the court room in the city and county of San Francisco, on Friday the 4th day of February in the year of our Lord one thousand nine hundred and ten.

Present: The Honorable William C. Van Fleet, district judge.

THE UNITED STATES
vs.
JAMES DONNELLY. } No. 2186. Criminal.

Order of trial February 4, 1910.

In this case the defendant, James Donnelly, in his own proper person and with his attorney, and the attorney for the Government and the jury heretofore impaneled herein, being present in open court, the trial hereof was resumed, and James Masten was recalled and further testified on behalf of the Government, and Seeley Grif-

fin, Henry Griffin, Ira Stevens, Albert Nixon, Timothy Safford, and John A. Prentice were called, sworn, and testified on behalf of the Government, and John Harley was duly sworn to interpret from the English language into the Indian language and vice versa, and thereupon James Minol was called, sworn, and testified, through and by means of said interpreter, on behalf of the Government, and here the plaintiff rested. Thereupon Mr. Quinn, on behalf of the defendant, moved to dismiss the indictment on the grounds stated, and after argument by counsel it was ordered that said motion be, and the same is hereby, denied; to which ruling the defendant then and there duly excepted.

12 Thereupon Mr. Quinn made the opening statement on behalf of the defendant to the court and jury, and the further trial hereof was ordered continued until Tuesday, February 8, 1910, at 10 o'clock a. m., and the jury, after being duly admonished by the court, were excused until that time. Upon motion of A. P. Black, assistant United States attorney, it was ordered that Albert Nixon, a U. S. witness herein, be, and he is hereby, discharged from custody as a detained witness in the county jail, and further ordered that said Albert Nixon attend herein as a witness on behalf of the Government until excused by the court or by the United States attorney.

13 At a stated term, to wit, the November term, A. D. 1909, of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Northern District of California, held at the court room in the city and county of San Francisco, on Tuesday, the 8th day of February, in the year of our Lord one thousand nine hundred and ten.

Present: The Honorable William C. Van Fleet, district judge.

THE UNITED STATES
vs.
JAMES DONNELLY. } No. 2186. Criminal.

Order of trial February 8, 1910.

In this case the defendant, James Donnelly, in his own proper person and with his attorney, and the attorney for the Government and the jury heretofore impaneled herein, being present in open court, the trial heretofore was resumed and upon request of Mr. Black and no opposition being made thereto the Government reopened its case in chief and James Masten and Henry Griffin were recalled and further testified on behalf of the Government, and here the Government rested. Thereupon Warren Hancorne, Rose Jackson, Lulu Donnelly, Shragon Jim, W. H. Lawson, and Chas. Stevens were called, sworn, and testified on behalf of the defendant and the further trial hereof was ordered continued until to-morrow morning at 10 o'clock, and the jury, after being duly admonished by the court, were excused until that time.

14 At a stated term, to wit, the November term, A. D. 1909, of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Northern District of California, held at the court room in the city and county of San Francisco, on Wednesday, the 9th day of February, in the year of our Lord one thousand nine hundred and ten.

Present: The Honorable William C. Van Fleet, district judge.

THE UNITED STATES
vs.
JAMES DONNELLY. } No. 2180. Criminal.

Order of trial February 9, 1910.

In this case the defendant, James Donnelly, in his own proper person, and with his attorney, and the attorney for the Government and the jury heretofore impaneled herein, being present in open court, the trial hereof was resumed and James Donnelly (the defendant), William Norris, and Catherine Goodwin were called, sworn, and testified on behalf of the defendant, and Charles Stevens was recalled and further testified and defendant introduced in evidence his exhibits marked: 1, 2, 3, 4, 5, 6, 7, 8, and 9, and here the defendant rested. Thereupon in rebuttal Jos. Masten, Henry Griffin, and Ira Stevens were recalled and testified on behalf of the Government, and Paul Smith, John Big Fire, Milton J. Thompson, and Lucy Thompson were called, sworn, and testified on behalf of the Government, and Milton J. Thompson was recalled and testified on behalf of the defendant and in surrebuttal. And the further trial hereof was ordered continued until to-morrow morning at ten o'clock and the jury, after being duly admonished by the court, were excused until that time.

15 At a stated term, to wit, the November term, A. D. 1909, of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Northern District of California, held at the court room in the city and county of San Francisco, on Thursday, the 10th day of February, in the year of our Lord one thousand nine hundred and ten.

Present: The Honorable William C. Van Fleet, district judge.

THE UNITED STATES
vs.
JAMES DONNELLY. } No. 2186. Criminal.

Order of trial February 10, 1910.

In this case the defendant, James Donnelly, in his own proper person and with his attorney, and the attorney for the Government

and the jury heretofore impaneled herein, being present in open court, the trial hereof was resumed and F. W. Taft was called, sworn, and testified on behalf of the defendant, and James Donnelly was recalled and further testified on behalf of the defendant; and the evidence was here closed. Thereupon counsel for both sides argued to the court and jury and pending the argument the further trial hereof was ordered continued until to-morrow morning at 10 o'clock, and the jury, after being duly admonished by the court, were excused until that time.

16 At a stated term, to wit, the November term, A. D. 1909, of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Northern District of California, held at the court room in the city and county of San Francisco, on Friday, the 11th day of February, in the year of our Lord one thousand nine hundred and ten.

Present: The Honorable William C. Van Fleet, district judge.

THE UNITED STATES
vs.
JAMES DONNELLY. } No. 2186. Criminal.

Order of trial February 11, 1910.

In this case the defendant, James Donnelly, in his own proper person and with his attorney, and the attorney for the Government and the jury heretofore impaneled herein, being present in open court, the trial hereof was resumed by the further argument of counsel. Thereupon the court delivered its instructions to the jury, who at 12 o'clock m. retired to deliberate upon their verdict. At 3.05 o'clock p. m. the jury returned into court, and being asked if they had agreed upon a verdict, they replied in the affirmative and returned the following verdict, to wit: "We, the jury, find the defendant guilty as charged, without capital punishment. (Sgd.) John Connor, foreman." Said verdict was ordered recorded and the jury upon being asked if the verdict as recorded was their verdict, answered that it was, and the jury were thereupon excused from further service in this case. Upon motion of Mr. Quinn it was ordered that this cause be continued until February 28, 1910, at 10 o'clock a. m. for
17 sentence; and it was ordered that the defendant be committed in the charge of the U. S. marshal and produced in open court on said day.

18 In the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

THE UNITED STATES OF AMERICA
vs.
JAMES DONNELLY, DEFENDANT.
No. 2186. Criminal.

Verdict.

We, the jury, find the defendant guilty as charged, without capital punishment.

JOHN CONNOR, *Foreman.*

(Endorsed:) Filed Feb. 11, 1910. Southard Hoffman, clerk. By W. B. Maling, deputy clerk.

19 At a stated term, to wit, the November term, A. D. 1909, of the Circuit Court of the United States of America, of the Ninth Judicial Circu in and for the Northern District of California, held at the court room in the city and county of San Francisco, on Monday the 28th day of February, in the year of our Lord one thousand nine hundred and ten.

Present: The Honorable William C. Van Fleet, district judge.

UNITED STATES
vs.
JAMES DONNELLY.
No. 2186.

Order sentencing defendant.

Now comes James Donnelly, the defendant in his own proper person, and with his counsel, and also comes A. P. Black, assistant United States attorney. And the defendant being asked if he had anything further to say why judgment should not now be pronounced against him in accordance with the verdict heretofore rendered. Thereupon the defendant presented and filed his motion for a new trial herein, and after argument by counsel it was ordered that said motion be and the same is hereby denied; and thereupon the defendant presented and led his motion for arrest of judgment, and after argument by counsel it was ordered that said motion be and the same is hereby denied. And nothing other or further appearing it is ordered and adjudged and the sentence of the court is that the said defendant be imprisoned at hard labor in the United States penitentiary at Leavenworth, Kansas, during the period of his natural life; and that a judgment be signed, filed, and entered accordingly.

20 At a stated term, to wit, the November term, A. D. 1909, of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Northern District of California, held at the court room in the city and county of San Fran-

cisco, on Monday the 28th day of February, in the year of our Lord one thousand nine hundred and ten.

Present: The Honorable William C. Van Fleet, district judge.

THE UNITED STATES OF AMERICA *vs.* JAMES DONNELLY.	No. 2186. Criminal. Convicted of murder on an Indian reservation.

Judgment on verdict of guilty.

Now on this 28th day of February, A. D. 1910, the defendant, James Donnelly, with his counsel, J. F. Quinn, esq., being present in open court, comes A. P. Black, assistant United States attorney, and moves the court that judgment be pronounced in said case; whereupon the defendant was duly informed by the court of the nature of the indictment filed on the 26th day of October, 1909, charging him with the murder of one "Chickasaw," an Indian; of his arraignment and plea of not guilty; of his trial and the verdict of the jury on the 11th day of February, A. D. 1910, to wit: "We, the jury, find the defendant guilty as charged, without capital punishment."

And the defendant being then asked if he had any legal cause to show why judgment should not be pronounced against him, and no sufficient cause being shown or appearing to the court, there-
21 upon the court rendered its judgment:

That whereas the said James Donnelly, having been duly convicted in this court of the crime of murder but without capital punishment;

It is therefore ordered and adjudged that the said James Donnelly be and he is hereby sentenced to be imprisoned for and during the term of his natural life, at hard labor, in the United States penitentiary at Leavenworth, Kansas.

WM. C. VAN FLEET, *Judge.*

(Endorsed:) Filed and entered February 28, 1910. Southard Hoffman, clerk. By W. B. Maling, deputy clerk.

22 In the Circuit Court of the United States, Ninth Judicial Circuit, in and for the Northern District of California.

UNITED STATES *vs.* JAMES DONNELLY.	No. 2186.

Certificate to judgment roll.

I, Southard Hoffman, clerk of the Circuit Court of the United States for the Ninth Judicial Circuit, Northern District of Cali-

fornia, do hereby certify that the foregoing papers hereto annexed constitute the judgment roll in the above-entitled action.

Attest my hand and the seal of said Circuit Court this 28th day of February, 1910.

[SEAL.] SOUTHARD HOFFMAN, *Clerk*,
By J. A. SCHAERTZER, *Deputy Clerk*.

(Endorsed:) Filed February 28, 1910. Southard Hoffman, clerk. By J. A. Schaertzer, deputy clerk.

23 In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

THE UNITED STATES *vs.* JAMES DONNELLY. } No. 2186.

Bill of exceptions.

Be it remembered that this cause came on regularly for trial on the 3rd day of February, 1910, in said court, a jury having been regularly impaneled to try the said cause. The Government was represented by the honorable assistant district attorney, A. P. Black, and the defendant being represented by J. F. Quinn, esq. After the jury were sworn to try said cause, the following proceedings were had and evidence introduced as follows, to wit:

JAMES MASTEN, called for the Government, testified as follows:

I live on the Klamath, am thirty-eight years old, and keep a store on the Klamath. I keep a store on the Klamath about 250 yards, maybe 300, from the Klamath post-office. The post-office is on the right bank of the river going down, and my store is about 250 yards down the river. Sullivan lived below me, and then old Dick, then McGarvey, then Chickasaw. Chickasaw was an old Indian belonging to the Klamath tribe. I knew him since I was a boy. I talked the Klamath Indian language with him lots of times. He was a full-blooded Klamath Indian. Have lived steadily on the Klamath for ten years last; before that, off and on. I think Chickasaw was killed along the last of October in 1902; not sure. No records of dates were kept. Chickasaw was killed in the morning. I was getting out of bed; I heard the shot and noise like
24 a hog squealing, and I heard a dog bark. I looked at my watch and thought they were killing my hogs. Was around about an hour or an hour and a half cleaning up, and Sullivan came and said, "Chickasaw is killed down there on the river," and I went down upon the river bar and saw Chickasaw lying on top of the bank wrapped in a blanket and was dead. He was shot, and there was a wound near the collar bone. Saw Chickasaw alive two days before that. After seeing Chickasaw lying on the bar dead, I went forty or fifty yards further up the bank and saw the mark of

a knee in the sand in the willows. I tracked from the mark of the knee, from there down. There is a trail running to Sebastian's place, and which I own now and where Henry Griffin then lived. There were man's tracks, and I followed them three hundred yards. The track led pretty near to the end of the bar. It was going through the willows again, and I got scared and jumped over the fence. By the end of the bar, I mean the river bar. There was a kind of a trail along the bar, the main road running on the upper side, up on a bank on a little hill. When I left the little trail, it went to the main road that I travelled. Chickasaw was about ten or fifteen feet from the edge of the water when I saw him, really within a few feet of the Klamath River. From where I saw the knee print to where Chickasaw was lying there was nothing to obstruct the view.

Cross-examination:

Chickasaw had his own trail to the river, and his house was about as far from the river as mine was from Johnson's store. A man's head could be seen over the tops of the willows if he was standing up. When the water is high it comes up to the high bank and covers the bar, and if the water was high you could not see the clump of willows. The clump of willows was about forty yards from where Chickasaw was lying. The Indian village above where I lived was called "Wahtec" and that below "Orlett." Below this village I own a hundred and forty or one hundred and fifty acres of land which is deeded land. I bought it and pay taxes on it. There is a school house on my land. It is maintained by the county, and not by the Government. The school district is Florence. There is an orchard on my land. The river bar ended near the orchard. The first time I followed the tracks about 100 yards, the second time I went clear through. The trail left the river pretty close to my west line, I guess. The track left the river about fifty yards from where the house, then occupied by Henry Griffin, was located. This house is about seventy-five yards from the river. Johnson's and these villages all set close together, pretty close together. You could see all the houses plainly from where the old Indian was lying. The body was carried from the river up to where I saw it lying, ten or twelve feet from the river. The freight coming up the river for Johnson's store from Requa landed above where Chickasaw was shot. The river is about fifty yards wide at this point, but you could not wade it there. They freighted up there in the summer, but in places they have to unload. In the afternoon I saw blood right at the edge of the water and also between where Chickasaw was lying and the edge of the water. I think he must have run up a way; you could see the blood. The blood did not extend all the way from the water's edge to where I saw Chickasaw lying that morning.

SEELEY GRIFFIN, sworn for the Government.

I live at James Creek, and in the month of October, 1902, was living on the Klamath. I knew Chickasaw, an old Indian. I lived down

the river near the Klamath post-office, about three or four hundred
yards from Chickasaw's place, very near a quarter of a
26 mile. It was nearly as far from the Klamath post-office to
Chickasaw's as from where I lived to Chickasaw's. I did not know Chickasaw was killed until about eight o'clock. I heard a shot in the morning about seven, near seven. Was in bed at the time, and after the shot I heard a noise I thought was a dog. My brother is Henry Griffin. At the time of the shot he was outside. About an hour after we heard the shot, and after we had our breakfast, Henry and I went up the river past Chickasaw's place, heard some women folks crying, and looked down the river. When we got to the river we saw Chickasaw, the old Indian, laying there dead, who was shot that morning. Chickasaw was an old Klamath Indian. I knew his wife; she was down on the bar; I think she is still living; I guess she is. Chickasaw that morning had on either a blanket or clothes. They packed him up to the house; he did not stay there.

Cross-examination:

My mother and sister-in-law were living with me and my brother; they are both dead. At the time I saw Chickasaw the body was not very far from the edge of the river; somewhere on the top of the bank and the slope of the river. My brother, Henry Griffin, was near by when I came up to view the body. The house I lived in at that time was not very far—I don't know how far—from the Klamath River. There were some little fields between it and the river; orchards. We can see the river from the house; further down we can not see very plain because of the willows which grow along the bank.

HENRY GRIFFIN, sworn for the Government.

I live on the Klamath, and have lived there about eighteen years. I live in the the same place now that I lived in in October, 1902, and
which is the place now owned by Jimmy Masten. I knew an
27 old Indian by the name of Chickasaw. He lived up the river
from my place, about four hundred yards, I guess. Chickasaw lived between Jimmy Masten's and where I now live. Have known the defendant, James Donnelly, since I was on the Klamath, eighteen years. I was there the day Chickasaw was killed. That morning I first heard a shot. It was about seven o'clock; I was outside, going to look for my cows. After the shot I heard a sound like a holler; sounds kind of choked up *up* cry or holler. I then went about forty yards from the house looking for my cow; there was a little spring about twenty yards from the house and bushes down the hillside on a trail. When I got there I looked down and saw some one coming up. I kind of stooped down. I wanted to look who it was. When I looked up I see it was Jim Donnelly coming up. I hid kind of behind a bush. I stepped behind a bush. When he was coming up the road he was looking around, and he struck down the road kind of down this way. It reached down this way; the road around this

way, that is a little trail. When he reached the road he started to run down; he ran around that point, about fifteen yards, as far as I could see. He had a gun with him. I did not speak to him and I would not show myself when I see a man come up in that way on a cow trail and not on a regular trail. I went back to the house right away and we had breakfast; then I told Seeley, "Let us go up to the ranch after breakfast." We went up and heard an old woman cry about her husband. It was Chicksaw's wife. She is now pretty old and it would be hard for her to travel over the snow to get here. When we heard the woman crying we were on the flat and looked down on the gravel bar. I saw they were packing him up rolled in a blanket; four men. I don't know who they were. I started to follow the track from where they shot him. I started from the willow bush and followed the track. I followed the track in the sand as far as the cow trail that I saw Jim Donnelly coming up that morning. The first person I told that I saw Donnelly was Chapman, who kept the store on the Klamath. He and Donnelly had a row in a game of cards. I could not tell when I told Chapman; I think that was in the fall. I left there in July, and that fall Chicksaw got shot; that was that year.

Mr. BLACK. Q. Was that two years ago this last fall? The last fall was the fall of 1909. One year would make it 1908 and another year back would make it 1907. Was that the time that you told Chapman?

A. I could not tell you. I don't remember. I knew that was the time that I left. When I told Chapman I guess was in the fall, and I left there the next July and I stayed at Arcata, Camp Nine, all that time. I did not tell what I saw that morning long before this because that is not right; if I tell anybody, I might get into trouble myself. I was afraid to tell because he might get after me if I tell anybody.

Cross-examination.

I could not tell how many years after I told that. I know it was when we have a row in Chapman's house. I did not pay any attention to the shot when I heard it that morning till I got to the ranch; I didn't know a man had been shot.

Q. Where was it your cow was running that you went to find?

A. It was all open prairie, all open place, and the orchard is on the low side; the country road runs up there. There was a fence on both sides; the orchard was fenced in. I went down the river about forty yards from the house and I hid behind the bush, and I guess I was fifteen or twenty yards from where I saw the man coming up the trail. He walked up the hill. I did not speak to him because I was afraid of Jim Donnelly myself, as he pretty near shot me once with a shotgun. We had a quarrel outside of the store. I picked up no rocks; there was no rocks around. I did not chase Jim Donnelly into the store with two rocks, and he did

not after running in there tell me to drop these rocks after he picked up a gun that happened to be in the corner of the store. He ran in the store and grabbed the gun. I did not follow Jim Donnelly inside; I was standing in front.

Q. You followed Jim Donnelly inside?

A. No, sir; I was standing in front. I did not go inside.

Q. Did not the trouble occur on the ground?

A. Right after. I never speak to Jim Donnelly never more, and my wife is his aunt. Cooper married his sister. We came up, that is at the brush; we were coming up there on the fourth, and Jim Donnelly jumped in front of me and said, "Why don't you speak to me." I tell the women to go inside. I said, "Jim, don't bother me." He said, "I want to know why you don't speak to me." I said, "Don't bother me; I don't want to speak to you." That is at the time I tried to hit him he tried to pull out his knife, but I don't give him a show to pull out his knife.

Q. This gun that you speak of was inside of the store?

The COURT. He is talking of another time.

A. That is another time; that is after when he was trying to shoot me; that is the time we had a row on the ground; that is what you talk about, on the ground.

The COURT. Q. Outside of Johnson's store?

A. Outside of the store, right at the store. When he tried to shoot me we were not on the ground; we were on the porch. I didn't tell my brother that I saw Jim Donnelly go up the side hill and I hid behind the bush, because he was a kid and might tell it to somebody. After we went up to where I saw them packing Chickasaw, my brother and I must have went back for dinner, and I did not tell him about seeing Jim Donnelly in the morning. We tracked in the forenoon. Jimmie Masten was the first to track, and there was a whole lot of fellows who tracked. I went clear down to the end of the bar, to the end of the orchard fence. When we went to follow those tracks, we were all trying to find out who shot Chickasaw. It was not our business. We did not care much to find out, because it was not our business. I took the trouble to go down there and follow those tracks and never told anybody what I had seen that morning. Though assisting in tracking, I would not tell nobody. I know Charlie Stevens, who lives at Blue Creek, four or five or six miles below Johnson's. Have known him since he was on the Klamath, and he has a sheep ranch. I went down the river with him in a boat in October, 1907. I know where, I know the place called Lamb's Riffle. I was going down to Requa with Mr. Stevens in a boat after freight. I did not say to Charles Stevens near Lamb's Riffle, when we were going down together to Requa in this boat along about two years ago last October, that I had seen someone running across the field up the river and that I thought it was Jimmy. I know George Flounder.

Q. Did you at that time say and tell Charlie Stevens, "George Flounder offered $20 to have me say it was Jimmie. I thought I would not say anything more unless they paid me more."

A. No, sir; I don't think so.

Q. You don't think so?

A. No, sir; I don't think so. If I tell him they must know, the same way that I know because I don't forget what I see. That is pretty near eight years ago, but I remember what I see.

Q. Did you tell Mr. Stevens that you thought it was Jimmie,
31 but you would not say that it was him unless they paid you more than $20?

A. No, sir; I don't think so.

Q. You don't think so?

A. No, sir; I don't think so. You can get George Flounder and prove if he offered me money, and you can prove it if George Flounder said he offered me money. I don't think George Flounder would say he offered me anything.

The COURT. Q. Did he offer you any money?

A. No, sir.

Redirect examination:

I told Jimmy Donnelly I knew he killed Chickasaw when I had the trouble at Chapman's house. I told him, "Jim, don't fool me; you would like to kill a fellow because you killed Chickasaw." He asked me if I can prove it. I said yes, because I see you coming up that hill. Chapman was there, and John Acorn. We were playing cards there, about ten or eleven o'clock at night.

Recross-examination:

At the time Chickasaw died, I had about four cows; ten altogether, which I bought around there. Besides ranching I run a store. Jim Masten and I ran a store there, but Jim bought me out. We sold coffee, sugar, and flour. They gamble all over the place at any place, though they have police.

Further redirect examination:

I and Chickasaw lived on the Klamath Reservation that ran along the Klamath. Where I lived was deeded land. When I told Donnelly I knew he killed Chickasaw, he told me if I could prove it. I said "Yes, because I see you." He said in Indian language, "You'd better not say that, for Chapman will hear it." Chapman did not hear him. I says "I don't care who hears it, I will tell what I know." He spoke in the Klamath dialect.

Mr. QUINN. Q. You did care at this particular time; but several years before that you did not care.

32 A. I don't think so, that I tell anybody.

Same witness recalled.

When I followed the tracks along the sand bar, one of the tracks showed that the shoe was patched. This showed clear along the bar.

I saw Jim Donnelly in front of Jim Masten's store about eleven o'clock the same morning that Chickasaw was killed. There was a whole lot of fellows there, and Jim Masten, talking about wanting to find out who killed Chickasaw I was talking there, and seen this old woman, Jim Donnelly's mother-in-law, and see Jim and his wife. This old woman said to me a fellow got killed down there. Jim Donnelly's wife steps down, going down that way. Jim was standing there awhile, and afterwards he came along and he stopped in front of the store of Jim Masten, and the sled was remaining this way. There was a door here, and I sat on the edge of the sled and Jim Donnelly sat on the end. I on that side and he on this side, and got his feet this way [illustrating]. Some one was talking. I said "Oh, there is the man that got a patch on his shoe," and he put his feet down, got up, and went down to old Dick's house. He came right back, but never stopped; went right along. When he sat with his legs crossed, I see a patch on the sole of his shoe. That was the same patch that the patch was on the sole that we saw on the tracks. All Jim said was "Oh," and put his feet down.

Cross-examination:

The COURT. Q. Were they talking about the patch?

A. Yes, sir; a whole lot of fellows sat down.

Mr. QUINN. Q. You were anxious to find out who it was that did the shooting? You were all together trying to find out who did it?

A. Yes, sir; all talking there, a whole lot of fellows; I don't remember how many of them.

Q. You did not tell anybody there while you were talking
33 about this patch that you had seen Jim Donnelly before that morning down below your house?

A. No; I would not tell anybody.

Q. If you would not tell anybody that, why did you tell Jim Donnelly "Here is the man with the patch" in front of the crowd?

A. Because I see he had the patch. I says, "Here is the man who has a patch on his shoe."

Q. You knew the person whom you thought did the shooting had a patch on his shoe; you had seen Jim Donnelly down there before that, but would not say that, but you would about the patch?

A. I would not tell my own brother; I am afraid myself. If I told that, he might have done the same thing and shot me somewhere, you see. I did not tell Mr. Lawson, a white man, who has charge of a store, last summer up at the Klamath, that I heard the shot that morning, and that I saw the smoke and saw Jim Donnelly run up the river and where the smoke was. I did not tell Lawson that, as I did not like Lawson, as he run all the people down on the Klamath, which Jim Donnelly knows himself. I never tell a word to Lawson.

Same witness recalled.

There was a trail from the place where I lived from 1901 to 1902 that leads back up to Pecwan around the side hill; have been over the trail lots of times and don't think it takes a man who hurries

more than an hour to get from my place over this trail to Pacwan. Jim Donnelly that morning disappeared around the point on the other side of which is the Sebastion mine and I saw the defendant; it was down the river below my house.

IRA STEVENS, called for the Government.

I live on the Klamath and have lived there all my life. I generally trap animals for fur. I know Jim Donnelly since he was a boy. I knew the old Indian Chickasaw. He was a pretty good kind
34 of a fellow and an Indian. He lived about two hundred yards from the water's edge on the Klamath. His house at high water would not be more than seventy-five or a hundred yards. His house was on the bank close to the sand or gravel bar, which was covered at high water. After Chickasaw was killed, had a conversation with James Donnelly at Doctor Rock on the mountain. It was about *about* twenty-four miles from Klamath post-office. We were out there hunting at Doctor Rock; my brother Charlie was along, too. We got speaking about an Indian up there that got into a trouble about a horse. His horse bucked up against a girl and killed her. My brother Charlie said, "If he had been in Jimmy Mack's place—it was Jim Mack who owned the horse—I never would have paid for that girl." Jim Donnelly said he had to pay for it, he had to, or they would kill him. He said, "I know that Shreghorn George was going to kill him that fall." Jimmy says, "He had to pay for her, he said, he would have killed him." My brother Charlie says, "What was the law for?" He said, "I would put him under bonds; if I had been Jim Marks, I would not have paid for that girl." "That does not make any difference," Jimmy says. Just then my brother was wiping his gun; he stepped to the door to look through the gun and Jim Donnelly said, "I killed Chickasaw." I said, "Jimmy, if you did that, you did a dirty, cowardly trick." He was going to tell me some more and right then he quit. Jim Donnelly was a good shot with a rifle.

Cross-examination:

I am a pretty good shot myself. I am not friendly with the Donnelly family. Since the time we had a row in my house, when he called my boys those names. We are not at all friendly. Kitty
35 Donnelly is a sister and never spoke to me for fifteen years. I answer her, but she never speaks to me. I don't know that I am one of the most active persons against Donnelly in securing evidence in this case. I have told all I know.

Q. You have taken a great interest in trying to hunt up evidence in this case. You went to see people, not in regard to your own testimony, but you went to see other people in this case; is that not right?

A. I guess so. I am a half breed. I knew Chickasaw in his lifetime, and I believe his wife was an Indian doctor. I had three fights with Jimmy Donnelly. It was all his own fault. I did not beat him up each time. I got the best of it each time. The conversation I

had at Doctor Rock with Jimmy Donnelly in relation to shooting Chickasaw was about five years ago, something like two years after the death of Chickasaw. When Jim Donnelly said he shot Chickasaw, my brother was right outside looking through his gun.

Redirect examination:

At the time we were at Doctor Rock, Jim Donnelly and I were good friends. He was a partner of mine. Charlie Stevens my brother is married to Jimmy's niece.

Same witness recalled.

There are two or three trails leading from Henry Griffin's place from where Henry Griffin lives back up to Pecwan. I have been over it part of the way. The Sebastion mine is 250 or 300 yards below where Henry Griffin lived. I don't know where the trail that I speak of comes up. I know where it is on the other end of Johnson's. I have never been right up that gulch back of this mind where he is speaking of.

JAMES MINOL, sworn for Government.

My name is Jimmy Minol.

(Not being able to speak or understand English intelligently, an interpreter was sworn to put questions to the witness in the Indian language.)

36 I live on the Klamath, and know Jim Donnelly and knew Chickasaw. I saw Jim Donnelly two years ago at a jump dance given at my father-in-law's place on the Klamath. I did not hear him say anything about killing anybody at that time. I did not hear him talk to a man by the name of Hansen. I said to you [addressing Mr. Black] in the presence of Mr. Prentice that Hansen was sitting alongside of the table on a bank something like that and I saw Jim Donnelly coming, and he got up and went away. That was what I told you yesterday. When Hansen started to go away, Jim Donnelly hollered. He says, "The reason perhaps you got up was because I killed your uncle." Chickasaw was Hansen's uncle.

Cross-examination:

I am not friendly with Jimmy Donnelly at all. I am not friendly with Jimmy Donnelly because he never comes around my house. Ira Stevens told me that Mrs. Goodwin had written letters to the sheriff to arrest me.

ALBERT NIXON, sworn for the Government.

I live on the Klamath, in Humboldt County. I was around at Johnson's, Klamath post-office, in the month of October, 1902. I knew Chickasaw, an Indian. I was staying at Sullivan's place between Jimmy Masten's and Chickasaw's. Sullivan's place is about 200 yards from the bank that goes down to the bar, away from the river. I remember the day Chickasaw was shot. I was in the garden in the orchard. I heard a shot and just lifted up my head

to the river and saw a bullet twice skip along the water. I knew it was a bullet and I heard the shot. I heard the shot and saw white foam along the middle of the river. I suppose it was a bullet, glanced twice. Saw a bullet glance on the water before at Requa when Charley Sanford shot a sea lion. The same thing I
37 saw when Chickasaw was shot. I just saw the splashing of the water, but I could not see Chickasaw from where I was sitting. I found out Chickasaw had been shot about an hour afterwards. I and Jimmy Masten went down together where we saw Chickasaw lying on the bank. He was bleeding right in the throat. He was naked; he had a shirt on, that's all. He had nothing on his legs. Some one had covered him with a blanket when we got there. I had a talk with Jim Donnelly about a year or two ago on the Klamath. I met him at Requa on Sunday. I asked him when he got down, and he said, a little while ago. I asked him when he was going back, and he said that afternoon. I said I will go along too, and he said all right. We went up afterwards. We got to the ferry landing and Jim had a quart bottle. We got in the boat; Jim had a quart bottle; Jim sat in the bow, and I steered the boat. We had a double ended boat and a little sail. About a mile up he said, "We will take a drink," and I said, "No." Then we went about fifteen yards and he said again, "You'd better take a drink." I said, "I don't want a drink because I am going to my work; I got to get there on time." It was along about three o'clock and I told him I "wanted to get there about four." He was drunk and half shot, anyway. He asked me to drink again. I said, "No, Jim, I don't want a drink." He laughed at me when I said that. He was laying in the bow. I guess Jim knows, too. He laughs at me and says, "What is the matter with you, Albert, that you don't want to drink with me?" I told him, "No, I don't want to drink because I am going up where I had to work and I wanted to get my work." Then he got up and pointed to me and said, "If you are not going to drink, I will throw you in the river, and you will stick your head, like old Chickasaw, out from the river." Just because I did that. That was all he said and nothing else. He tapped the boat like that [illustrating], and says, "Poor man, he'll do it." He kicked
38 the boat at the same time he said that.

Q. Do you know what he meant when he says, "Poor man, he will do it?"

A. He must have meant he gets a little money by that.

When we landed I went to my work to Bill Williams place.

Cross-examination:

I came to San Francisco from Crescent City a little over a month and a half ago. I have been staying in the Skookum house, the county jail. I was kept there as a witness. I stayed at Sullivan's the night before Chickasaw was killed, as my uncle married into Sullivan's family. I am not friendly with Jimmy Donnelly and I don't like Jimmy Donnelly. I did not drink anything when I went

up in the boat that day to Bill Williams' place, two years ago last summer. He asked me several times to take a drink, and he says, "If you don't drink I will treat you in the same way that I did old Chickasaw." After that we went up the river about fifty yards and he told me again. Though he made this threat, I did not drink with him. I never get drunk or take liquor.

Redirect examination:

I was friendly with Jimmy Donnelly at the time of the talk, because I liked to go home with him, who was a friend; I was broke and had no money at that time. I thought I would talk to him good, so he would take me up.

JOHN A. PRENTICE, sworn for the Government.

I live at Eureka and I have been over the Hoopa Indian Reservation and Klamath extension. The reservation extends about two and a half miles below Johnson's to an Indian village named Super; I should say it is two miles and a half below Johnson's or the Klamath post-office, and anyway two miles below Griffin's place.

JAMES MASTEN recalled.

39 When I followed the tracks down the river, right on the end of the bar I saw where it looked like a man sat down.

(Government rests.)

Mr. QUINN. At this time, may it please the court, I move the dismissal of this action on the ground that, first, they have not established the jurisdiction of this court by showing that this alleged offense happened within the limits of the extension of the Hoopa Valley Indian Reservation; secondly, on the ground that there has been no evidence introduced in this case to show, nor does the indictment allege, that the defendant is an Indian.

The COURT. I will deny the motion.

Mr. QUINN. We will take an exception.

(Before the defense put in any testimony, the Government asked permission to reopen its case, which was granted.)

JAMES MASTEN, recalled, testified as follows:

I noticed a small patch across the sole; that is, the impression showed a patch on it. The second time I tracked clear through to the end of the bar where the trail turns up; the trail ended on the side hill. The trail of the end of the bar must not be much further than the length of this house. It was narrow; the trail goes right down on the side hill. In places it gets down to the bar and goes up again. On the day Chickasaw was killed, I saw Jimmy Donnelly somewhere about the forenoon, I guess about eleven o'clock. I saw him in front of my ranch, my store. His wife was with him. His mother-in-law came from where Chickasaw lived, and Jimmy was coming down with his wife, and the old woman says: "There's a fellow got killed."

Jimmy stopped; his wife tried to walk, and Jimmy stopped
40 there for awhile, and then he followed his wife again. He came around, and a sled stood there, and he sat there for awhile. Jim Cleveland, Johny Joe, Orin Hancorn, Henry Griffin was there; I can't remember all. Henry Griffin said to Jimmy Donnelly: "Here's the man got a patch on his shoes," and I see Jimmy had both his feet down. I did not see anything, and they went on talking again. Henry Griffin made the remark, because we were talking about the patch on the shoe. I mean, we were talking about that the tracks had shown a patch. I did not hear Jim Donnelly say anything at all. I was very close to him. When his mother-in-law said Chickasaw is killed, I did not hear him say anything.

Cross-examination:

The sand was damp; must have been raining before. There was a mark on one of the footprints. When I saw Jimmy Donnelly that forenoon he came from up the river. When the matters of these tracks and the impression of the patch was talked about, he did not say anything; he got up and went down with his wife towards where Chickasaw was killed.

Defense then opened their case.

WARREN HANCORN, sworn for the defendant.

I was living on the Klamath at the time the Indian Chickasaw was killed. I was over to the village of Wahtec, the forenoon of the day that he was killed. I saw tracks; they went down the river. The sand was soft and did not leave tracks at all. You could see holes in the sand, that was all. It was not easy to judge the size of tracks from the condition of the sand that morning. I did not follow the tracks the whole way down. I followed them a little way. I saw the knee print, and the length of the knee to the foot was about that of an average sized man. Where the knee print was the sand
41 was not so soft as further down. Where the fellow knelt down there was a clump of some kind of brush, little willows three or four feet high, I guess. I saw Jim Donnelly about ten or eleven o'clock in the forenoon at Wahtec with his wife.

Cross-examination:

I was living right across the river from Wahtec at that time, on the place of Mrs. Goodwin, the sister of the defendant. Had the place rented. She was not at home the day of the shooting. I heard a shot that morning. There was lots of people at this little village about ten or eleven o'clock. I could not name them. I did not hear Henry Griffin talking to Jimmy Donnelly that morning. I am not related to Jimmy Donnelly. I can not name anybody who was there, but I say there was a large number there.

ROSA JACKSON, sworn for defendant.

I was born on the Klamath River; have been living the last two months in an Indian school, Chemawa, Oregon. Was living on the

Klamath when Chickasaw was killed. I lived at Pecwan up the river from Johnson's. My mother, Jimmy Donnelly, four of us altogether lived there. I went down the river the morning Chickasaw was shot and my mother. Mrs. Donnelly and Jimmy went down in the morning. Jimmy Donnelly was at home that morning, and I saw him at the house where I lived that morning. I have been going to school one year. I don't talk English pretty well. I don't understand what the lawyer is asking me. Jimmy Donnelly was there that morning before I went down the river.

Cross-examination:

I was twelve when Chickasaw was killed. I am nineteen—twenty-one, now. Was not going to school when Chickasaw was killed. There is no school near there. Jimmy Donnelly was married about one year to my sister before Chickasaw was killed. I do not
42 know how many years they have been married. I heard Chickasaw had been shot. An old man up there, I don't know his name, told that. My mother and I went down to find out about it. I am not scared or afraid. The name of the Indian who told us about Chickasaw being killed was Hotyaw, an Indian. When we heard Chickasaw was killed, my mother and I started down right away. When Hotyaw told Chickasaw was killed, Jimmy Donnelly was in the room. I was at Jimmy Masten's when Jimmy Donnelly came down afterwards. He came down with his wife. I do not remember whether Jimmy Donnelly said anything to the old Indian when he said Chickasaw had been shot. Jimmy Donnelly did not speak to the old Indian. My mother told Jimmy Donnelly Chickasaw had been killed. I don't know what he said to my mother when she told him that. I don't know what time I got up that morning. I don't know what time my sister, Mrs. Donnelly, got up. Mrs. Donnelly woke me up.

Redirect examination:

It is quite a long time ago, and I do not claim to remember everything that happened that morning.

The COURT. Q. Rosa, has anybody talked to you about what you should say here? Has anybody told you what to say here? You understand?

A. Yes.

I don't know what hotel I have been staying at since I came here nor on what street it is. Mrs. Goodwin, Jimmy Donnelly's sister, stays there with me.

(During the examination of the foregoing witness the following questions were asked of her and she did not answer.)

Direct examination:

Q. How many people were in the house where you lived, altogether about how many?

The COURT. Q. Do you remember?

The COURT. Q. What time did you see him there that morning?

43 Q. Did Jimmy get up after she did, or not?

The COURT. Q. You understand very well; why don't you answer?

(After the last question was asked witness said she had been going to school one year, and that she did not talk English pretty well, and that she did not understand what the lawyer was asking her.)

The COURT. Q. You do not? You answer pretty well. He asked you who got up first. You said Mrs. Donnelly. He wants to know if Mr. Donnelly got up after her or before her. If you do not know, say so. Did you see Mr. Donnelly there that morning? We don't want you to tell anything you don't know. Just tell what you know. If you don't know, say so. (No answer.) (Addressing counsel.) I think she is somewhat frightened. (Addressing witness.) There is no occasion to be afraid; no one will do you any harm.

Cross-examination:

Q. When was Jimmy Donnelly married to your sister?

The COURT. Q. When did your sister marry Jimmy Donnelly; do you remember? (No answer.)

The COURT. Q. How many years has he been married now? (No answer.)

Q. COUNSEL. What made you go down to Jimmy Masten's that morning?

Q. Why didn't Jimmy Donnely go along with you?

The COURT. Q. Why didn't Jimmy Donnelly and your sister go down with your mother and you when you went down; do you know? If you don't know, say so. (No answer.)

Q. Did Jimmy Donnelly speak to the old man, or did he hear him; do you know? (No answer.)

Q. Don't you hear? (No answer.)

Q. Has anybody told you what to say? Can you answer that? You need not be afraid. (No answer.)

LULU DONNELLY, sworn for defendant:

44 I am the wife of Jimmy Donnelly and lived at Pecwan with him at the time Chickasaw died. My mother and father, who is now dead, and my sister Rosa lived there in the same house. I remember the time Chickasaw was killed. An old man living at the Klamath post-office or Johnson's, I don't know which, told me. He used to go by the name of Hotyaw, an Indian name. I occupied the same bed with Jimmy Donnelly the night before Chickasaw was killed. I got up first, and it was daylight. My husband got up at breakfast time; we had breakfast about seven o'clock. I don't remember what Jimmy Donnelly did after breakfast, but he was in the house. I heard about the killing of Chickasaw about nine o'clock.

When we heard Chickasaw was killed we thought we would all go down and see. I did not go down the same time Rosa and mother went down, as I was dressing at the time. My husband went down with me. He got down to the Klamath post-office at ten o'clock; stopped at Poker Bob's awhile before going down to Masten's; it was below Poker Bob's. We walked down from Pecwan to Johnson's on the trail, a crooked road. After we left Poker Bob's we went to Jim Masten's. He and his wife were at the house. Before we got to Poker Bob's I met a fellow by the name of Whiskey Joe and his wife going towards Johnson's, going the same way that we were. I don't remember that we met anybody before we got to Jimmy Masten's, after leaving below Poker Bob's. There was lots of people around. I do not remember at this time all that were there. I don't remember how long I stayed at Wahtec. I had a meal at a fellow named Dick's. Jimmy was with me, and we stayed together all the time after we left Pecwan until we got home. We sat down to hear the news below Poker Bob's from Whiskey Joe. He was the one that we met with his wife when we was going down there.

45 Cross-examination:

I am twenty-nine years old; I have been married to Jim Donnelly ten years. Hotyaw is the only name that Indian had; Big Fire was another man; he is alive yet. Hotyaw is dead. I always got up first in the morning. Jimmy Donnelly never goes hunting early in the morning. He never got up in the morning; he never stayed away all night to go hunting. He was not out hunting that morning; I did not see Big Fire that morning. I did not tell Big Fire "Jimmy is out hunting" that morning. I never went to school at any place. I do not remember the time I got out of bed that morning, but it was about daylight. I think it was about seven o'clock and breakfast was ready, and then Jimmy Donnelly got up. When the old Indian told Jimmy that Chickasaw had been killed he was dressed. He did not go down to the post-office at once, or to Chickasaw's. He was waiting for me. My mother and sister went ahead. I saw my mother after that below Poker Bob's, coming back from down there, pretty close to Chickasaw's. I did not see my mother in front of Masten's. It was a short distance from Jim Masten's. Rosa was with her at that time and Jimmy with me. I don't remember that I spoke to Jimmy Masten. Jimmy never said nothing when my mother told me Chickasaw was killed.

SHLEGHORN JIM, sworn for defendant.

My name is Shleghorn Jim. Shleghorn is above Pecwan; have lived there all my life and remember when Chickasaw was killed. I went down to Johnson's in the morning; not very early. That morning I was at my brother Ed's, a long ways from the Klamath post-office. My place is not far from my brother's. I stayed at my brother's that night; came home that morning and heard Chickasaw

was killed. I went down to Wahtec in the forenoon, before twelve o'clock. When I got down to Wahtec I was down on the river
46 and looked at and followed the tracks. People were looking for tracks down there. I tracked the way down the river and lost the track when I got to the prairie. I tracked as far as I could on the sand. I tracked on the sand down the river below where Henry Griffin was; the sand runs clear below the house. From the track I did not know if the shoes were patched or torn. I think it was a patch or tore. I saw long steps, and think he was running. I thought there was one place where he had been sitting down under the willows, quite a ways from the house. This place that looked as though a party had sat down was a long ways from where I first commenced to follow the tracks.

Cross-examination:

Henry Griffin's house from the water at Klamath is a long ways. When I speak of below Henry Griffin's house I mean down the river. There was sand between the river and the bank, between water and high bank, extending down as far as Henry Griffin's at the time Chickasaw was killed. Johnny Joe was with me when I followed the tracks. I don't know where Henry Griffin and the other people around there were at that time. I saw Henry Griffin there where this fellow was killed. I did not see Griffin follow the tracks down a ways. I saw the tracks of other men besides these tracks in the sand about half way and the rest of the boys must have returned. I knew I was following the tracks of the man who was supposed to do the shooting; because a good many others were tracking the man; that was why I tracked him. I only remember Jim Masten, Big Fire, Johnny Joe besides myself who tracked him; only Johnny Joe and myself tracked clear through; the rest of them went back. I seen the track and thought it showed a patch or a tore. I did not go to Chickasaw's; I did not see Chickasaw's body, as it was carried
47 away before I got there. It must have been at the house. I looked at the tracks because a good many were looking at them. Jimmy Masten told me there were tracks leading from this willow down the river. I am no relation to Jimmy Donnelly. Nobody told me Chickasaw was killed. When I was going to my own house from my brother's house I heard Chickasaw was killed. An old woman told me a man was killed down there. I did not see Big Fire at Jimmy Donnelly's house that morning. I saw Big Fire tracking. There was a trail right above where we last saw the tracks. A trail from the bluff down to where I last saw the tracks. I have a brother married to Jim Donnelly's wife. There was a place where the man sat down under the willows.

W. H. Lawson, sworn for defendant.

I live at present at Redondo Beach, Los Angeles County, California. Was in charge of Johnson's store from December 18, 1908, to August 18, 1909. Got acquainted with Henry Griffin there. Henry

Griffin during the last year while I was up there made a statement to me that the morning Chickasaw was shot he heard the shot and saw the smoke and at the same time saw Jimmy Donnelly, or thought he saw Jimmy Donnelly, run up the river.

Cross-examination:

Am friendly to Henry Griffin. Left there because the store closed. He said "up the river." It was the day Jimmie Donnelly was arrested and taken away. I would not make a positive statement if was "up the river" or "up from the river" that Griffin said. He said he saw the smoke. He speaks bad English, as most Indians do. The Indians were all talking there and they had it in for Donnelly. He is not well liked among them. I took Chapman's place, who had charge of the store at Johnson's. He was killed December 16, 1908.

CHARLES STEVENS, sworn for defendant.

48 I live at Blue Creek, ten miles from the Klamath River and Johnson's. I have been engaged a long time in the sheep business with my father, a white man. Am acquainted with the Klamath River from its mouth to Johnson's and have freighted wool down the Klamath River. I came to Johnson's two days after Chickasaw was killed. It was in October, 1901. When I got there Chickasaw was buried.

COURT. You are drawing from this witness things which he can only know by hearsay. That is what I am bound to protect the case against, statements of this kind.

When I came to Klamath in the fall of 1901, Joe Dick had an acorn camp on the top of the hill two miles from Johnson's, just a little north of east from Johnson's. To go to this camp from Johnson's you start northwest, straight back from the river. The house on Jimmie Masten's place is between 250 and 270 yards from the river. The house is the same house that has stood there for twenty-five or thirty years, except it has been enlarged. In coming from my place to Johnson's we come on the ridge. Just before we turn off the ridge there is a cabin known as Poker Bob's and Joe Dick's. Coming the way I come, the house on the Marten place, the Sebantion place, is not in sight coming down the trail. Have been at the Sebastion place dozens of time. Was there last fourteen years ago. It is about 100 or 120 yards from the house to the first little ridge down the river. Pecwan is in an easterly direction from Masten's or Johnson's up the river. The land west of Griffin's house is open for a ways and then there is a gulch known as Fred Sebastian's mining ground about five hundred yards or more. Back of Henry Griffin's house up the hill is prairie land. This prairie land runs up hill. From the top of this open land that runs up the hill back of Henry Griffin's house it is

49 a pretty high way to get up to Pecwan Creek; there are many canyons to cross. Four canyons, I think. They are gulches going into the river. They are steep and bushy. These gulches are off back to Johnson's, not back of Sebastians.

I am acquainted with Henry Griffin, remember going down the river three years ago with him. That was in the fall of the year as I was coming down to prove on my homestead. Henry Griffin was going down for a load of freight for himself and went in the boat with him to Requa. As we were going down about Lands Riffle he says to me "Don't you know, I think Jimmie Donnelly killed that Indian." "The morning I heard the shot my brother and I were out at the house, and looked up the field and saw some one running across, and we thought it was Jimmie." "It got out some way, that George Flounder got a hold of it, and offered me $20 to say it was Jimmie." Then he said "I would not say anything unless he paid me more."

Cross-examination:

I am married to Jimmie Donnelly's niece. I have never went across the hills from Griffin's place to Pecwan. There are trails on the hill, not across the prairie. Never lived there but went to school at Klamath. I went hunting on the top of the hills at the points. I was 17 when I went to school there. Whisky Joe lived immediately below post-office, then Pecwan John, then George Meager, then Poker Bob, then Hurry. Klamath is my post-office address and lived ten miles from there ever since I was a kid. I am able to swear in what order the houses came and the people that lived in them from the Klamath post-office down to Henry Griffin's place in October, 1901 or 1902. First house above Henry Griffin's house is Ed James, then Chickasaw, then John McGarvey, then old Dick. Jimmie Masten lives about 200 or over from the post-office. It is about 800 yards or about half a mile from Henry Griffin's to where Chickasaw lived. In 1901 there was a little bar in the river all the way from in front of Chickasaw's place to below Henry Griffin's place. I never took notice of the bar particularly. I never noticed how low the water ran at that time.

Same witness recalled.

My brother Ira Stevens can not read or write.

Cross-examination:

I can read and write, and read enough to read a common letter. My brother never went to school. He can not read at all.

JAMES DONNELLY, sworn for himself.

I live on the Klamath, and have lived there for twenty-four years. I was born on the coast. When I went to the Klamath I lived on my mother's place, my father's place then. This place is located about a mile or a mile and a half from the post-office on the other side of the river and up the river. I am living there yet, and have lived there most of the time. There was some time I did not live on it. In the summer of 1901 I was working down below all summer at Dow's Prairie, and about thirteen years ago I worked at Crescent City. When I went to school I stayed at Orrick a great deal. I went to

school at Orrick, twenty-five miles from the Klamath on the coast, nowhere near Hoopa Valley Reservation. My father was James Donnelly, a white man. I lived on this land I spoke of in 1891. We owned the land. My father bought it from a fellow named Nick. I was living at Pecwan at the time of Chickasaw's death. Had been there about one month. It is about a mile and a quarter, a little over, I think, from Johnson's. Never measured it. There is about a dozen houses at Pecwan. My house was the furtherest up Pecwan Creek. In going up from Johnson's to Pecwan my house was last. Two brothers called Billie, one now dead, also, and Crescent City
51 Charlie lived there—also two or three brothers whose names I do not know. There are some houses empty. Up Pecwan Creek it is rough country, all timber. A fellow lived away up in the hill called Joe Reed, a little ways from Pecwan. There is a trail from Pecwan to Johnson's, rough in some places, other places sandy. It is the same trail that leads through Wahtec. This trail goes from Wahtec to Techta village, 2½ miles from Johnson's, and then from there to Tectan. In going over to the house on the Sebastian or Masten place, the trail follows the flat but does not go down to the river bar. This flat or bench is over twenty feet high and is not the bar. Have known the character of the river in front of the village of Wahtec and the Sebastian place since I was 14 years old. Have been down to Requa back and forth in a boat. I knew where ordinary high-water mark was 8, 9, or 10 years ago. It is about the same now. The bar has changed down toward the Sebastian place; it is cutting away at the lower end by an eddy.

The morning Chickasaw was killed I was at Pecwan at my wife's folks home. Her father, mother, and sister lived in the same house with me. The house was one big room made of weather boards. Remember going down to Wahtec that day. I got up that morning just before breakfast about 7 o'clock. Had not been up before that morning. Did not do anything after breakfast. What caused me to go down to Wahtec—we heard there was a fellow killed down there, Chickasaw. An old Indian came and told us—Hotyaw. It was about 9 o'clock. Rosa and her mother started ahead, and my wife stopped to dress and comb her hair before we started down. I did not go down with my sister-in-law or mother-in-law. It was a little after nine or about that time when we started. Went down the trail that leads to Wahtec or Johnson's. Saw no people going down to Johnson's, but we see them sitting around when we got to
52 Johnson's, and when we got further down we see some more—there was quite a number along the road there. We stopped in the vicinity of Johnson's, right below Poker Bob's. I saw Whiskey Joe and his wife and George Meager's family there. My wife was in the family way at the time. We remained below Poker Bob's quite a little while. Then we went down to Jim Masten's, about 40 yards away. I should judge I saw there Jim Masten and his wife at the house. Stayed there a little while. There was some people sitting down right below Jim Masten's down the hill. I did not sit down

on a sled at any place. Don't remember seeing Henry Griffin, and did not sit down in front of him on the grass or on a sled. Henry Griffin did not say to me at Wahtec that day while I was sitting on the grass or on the sled or in any position whatsoever, pointing his finger at me, "There is the man with the patch." We were not on speaking terms then, and we never spoke for years afterward. I did not wear a pair of shoes down to Wahtec that day with my wife with a patch on. The road along there in front of Johnson's in places was dusty. It was so dusty you could distinguish footprints along the roadway. We just stayed at Masten's a little while. Then we went to Joe Dick's below there. Stayed there about two hours until dinner time; had our dinner before we started back up. We call noon meal dinner. When we stopped in the vicinity of Poker Bob's we stayed there about 20 minutes. I saw Warren Hancorn right below Jimmie Masten's at the brink of the hill; a lot of fellows were sitting. No one was down on the river when I got there. I asked Warren Hancorn to go down with me and he said he had already been down there. Owned a gun in April, 1902; 1901 I mean. Sold it to Joe Reed. I got the gun from Warren Hancorn. Had it about a week and sold it. It was in April when we went down to Dow's prairie; I
53 sold it just before we went down. Went to Dow's prairie before Chickasaw was killed. Came back in September. I did not bring a gun back with me.

I know Albert Nixon. About four years ago I was coming up the river about a mile from Requa. and he wanted to cross, and I put him across. I had a quarter flask with me, a two-bit flask. I did not drink any of it or had drunk any of it. When he got out of the boat I pulled out the flask and told him he had better have a drink, and he said, "You will need that before you get up." I did not say anything to him in regard to that or that I would throw him into the river unless he took a drink like Chickasaw or say I would make him bob up and down out of the water like Chickasaw. I drank the whiskey before I got home. I know Henry Griffin, and I did not make any statement to him in Johnson's store that I would shoot him like I did Chickasaw. After Chickasaw was killed we were gambling, playing cards, at Chapman's. Warren Hancorn, Henry, and I were playing. I was beating Henry; I guess he didn't like it; he didn't like me anyhow; and he kept telling this Warren Hancorn, when Warren had the best hand, to call me; and then sometimes when he thought I had the best hand he would say, "Lay down, lay down, Warren." I said, "Why don't you play your own hand; let him play it himself." He jumped up and said, "You think I am afraid of you." He said, "You killed that old Indian down there." I said, "You are a liar, Henry" He said, "Well, I seen you; I seen you running up where that fellow was killed." I said, "You go to work and prove that." Chapman said he didn't want any trouble there, and he said to Henry, "It is a wonder you have not said something about it before if you know so much about

it." Over ten years ago, before Chickasaw was killed, I had trouble with Henry at Johnson's store; I was sitting on the steps; there was steps outside the porch, the steps leading to the
54 ground, and Henry Griffin was there and some other fellows, and Henry says, "I feel like fighting to-day." He says, "I feel like fighting Jimmie Donnelly," and at the same time he kicked at my head, and I jumped down on to the ground, and he walked around the porch and jumped off the porch and started down the hill, a trail like, and I walked back and sat on the steps again; he walked down and grabbed a couple of big rocks and came up ready to hit me with the rocks; I run into the store, and he run in after me with the rocks; there was a shotgun in the corner, and I says, "You lay down the rocks," and he stood there, and Johnson told him to go out. I know Ira Stevens. I did not tell him at Doctor Rock at any time that if Jimmie Marks didn't pay for a girl that he caused to be thrown off a horse and killed that I would shoot Jimmie Marks as I did Chickasaw, or used any words to that effect. It was before that girl was killed or ever died that we were up to Doctor Rock. I heard Minol's statement, or testimony, in reference to my making a statement at a dance to a man by the name of Hansen. I never made a statement to that effect. Hansen is still alive and lives on the Klamath. They say he is a nephew of Chickasaw's.

Ira Stevens and I are not friendly. We have had trouble a good many times. We always had a fight, and he always licked me. Ira trapped in the winter some; he used to sell liquor to the Indians; that is how we happened to get into trouble. Bought liquor from him. Jimmie Masten is a merchant and runs a gambling house in conjunction with his business. He sells whiskey; bought whiskey from him many times on the reservation. Where Jimmie has his store is right at an Indian ranch.

I knew an Indian by the name of Joe Dick; he is now dead, died of consumption. He lived at Wahtec, called Wahturp; he
55 lived at Poker Bob's a good deal. He lived right close to Chickasaw's, one house between. His house was about 50 or 25 yards away. I knew Chickasaw and never had any trouble with him.

It is a steep side hill back from the river betwen Pecwan and Johnson's or Wahtec, and it is full of gulches. From the edge of the river to the top, it is about two miles. Am acquainted with the Masten place. Masten lived there for awhile, when he first came on the river, I think he had it rented from Sebastian. He has lived most of the time at the Indian village where he has got his store.

Where the house is on the Sebastian place, there is a kind of prairie runs up there, about I should judge a half a mile. It is a narrow strip of prairie and along side of it is a high gulch and heavy thick brush and steep, a pretty good sized creek runs through on the right hand side. Down the river there is a bigger canon with a pretty good sized creek that salmon runs up. The bar or open land came down to the river at the time Chickasaw was killed, to where Sebastian used

to mine. You can see about a half a mile behind the Masten place up the hill; half a mile is all in plain sight, just sloping a little.

From where you leave the bar and keep out of sight over to Pecwan Creek, is about 2 miles. There are no persons who live over the ridge on the way to Pecwan Creek. Have crossed over in there. Joe Reed lives on the hill a little east of Pecwan. If you were down the river and wanted to go along the slope of the hill far enough back to keep out of sight from the houses along the river front, it will bring you up on Pecwan hill.

I did not walk down the bar that morning after Chickasaw was killed, right after he was shot. I did not go up that trail below the Masten place and below the houses.

56 Cross-examination:

I did not go down to the bar after I went to Jas. Masten's place or to Chickasaw's place. I did not want to go alone down where he was shot. I asked Warren Hancorn to go down with me and he said he had been down. I did not hear about the tracks; we were at Dick's place. My wife was home the morning Chickasaw was shot and I was there with her. It was between 10 and 11 o'clock, I think, when I got down to Masten's after Chickasaw was shot.

Was over to Doctor Rock a good many years ago with Ira Stevens. I did not have any conversation with Albert Nixon in a boat. I had a conversation with him. I landed him where he wanted to go to work. I did not have a conversation with Henry Griffin at Jimmie Masten. I had a conversation with him two years ago, in October, when we got in a quarrel and he charged me with having killed Chickasaw and having seen me run away, and I said he was a liar, and he would have to prove that. I am not the best shot on the Klamath. Ira Stevens can beat me. I do not generally take the prize when shooting for prizes. I have gotten beat more times than I have won. I don't hunt much. I trap a good deal and work on a sheep ranch a good deal. I have gone over these hills from below Griffin's place to Pecwan many times. I have herded sheep all over the hill there. I am acquainted a good deal on top of the country there. I have lived on the Klamath 20 years. I took up my residence at Pecwan in 1901 in the fall. I went to live at Pecwan in September or October, 1901, and lived there all winter. Had been living there a month before Chickasaw was killed. I lived about 400 yards up the creek from the Klamath with my wife, her people, her father, mother, and sister. I bought a gun from Warren Hancorn in April, 1901, and sold it in April before Chickasaw was killed. I did not have
57 a gun all summer. I borrowed a gun 2 or 3 years after from Charlie Stevens to go out on a hunt, sometime in August. I never borrowed a good many guns. I have borrowed guns, borrowed one from Charlie Stevens that time and I have—that is all; I don't remember borrowing any gun from anyone else. I was 21 years old when Chickasaw was killed. I don't call myself a good runner. I have run for fun. I have beat a good many and lots beat me. It

would take 4 or 5 hours for an active fellow to go through the woods to Pecwan from Henry Griffin's or the Sebastian place. It is further than a mile and a half to go around. I said Pecwan was a mile and a half above Johnson's. Jimmie Masten is a half a mile below Johnson's.

Q. Do you think it would take four hours and a half to go two miles and a half?

A. It is further than two miles and a half. It is impossible for Indians to leave Henry Griffin's place and go over and along the ridge and get down to Pecwan Creek inside of an hour. I lived on my father's place ten years before Chickasaw was killed. I did not go to school on the reservation. All the gulches is timbered running up from the Klamath to the top of Pecwan ridge, a kind of scrubby brush. There was a good sized orchard on the Sebastian place in 1901, fenced in; don't know whether the trees were called prunes or plums. It would not be far for a man to get out of sight from the corner of the orchard fence at the Sebastian place. The trail was between the house and the orchard, the orchard next to the river; the trail is the one leading from Pecwan to Johnson's. The Jimmie Masten ranch is known as the Sebastian place, and was rented by Henry Griffin at that time. It is not Jimmie Masten's store. The bench I spoke about is the one the orchard is on. It starts from the orchard to the river. Further down the river rushes grow. The lower end of the bar that the river cut away is the one that goes
58 by the Sebastian place. It has been away the last few years, the end of Jimmie Masten's orchard. Hotyaw told my father-in-law and mother-in-law that this Indian was killed. I did not talk to him, though I saw him. My mother-in-law and sister-in-law left about 15 or 20 minutes ahead before I started for Johnson's. I guess, don't know just how long. I saw my mother-in-law after that just a little below Poker Bob's at the corner of the fence; a little ways from Jimmie Masten's. I knew Chickasaw was killed. She said something about they packed him up to the house. I didn't go down to Chickasaw's. I didn't see anyone around there. I didn't want to go in alone with my wife.

Q. They all had been done and gone over these tracks, and had all come back when you got there?

A. Yes. I would like to have gone down, but I did not. I asked Warren Hancorn to go down, and he said he had been down there. I saw Whisky Joe, and, I think, George Meyer's family sitting around there. I saw Jimmie Masten and his wife at the house there. Don't remember seeing Henry Griffin. Was friendly with him from the time I was a kid until eleven years ago.

I had common shoes on that day, medium, something like I have on now; ordinary laced shoes. Five or six years ago I herded sheep along Pecwan ridge; I have herd sheep nearly every summer. We herded sheep all over the top of the hill, Pecwan ridge. We had a camp a little way from the camp. Sheep graze all over the ridges

there on bushes and stuff wild pea vine, and stuff like that. The prairie I spoke about is about one-quarter of a mile wide. It is covered with yellow dock now, what they call Texas flats; nothing eats it; a kind of stalk grass that high.

Redirect examination:

I never herded sheep on the Sebastian place. The sheep ranch is on top of the mountain, and they range down toward Pecwan
59 Creek, but they don't range on Pecwan hill there. Between the upper end of the Sebastian place, or Jimmie Masten's place, there is a steep hill; it is canyons, brushy canyons; the range is on top of the mountains; sheep will range on the roughest kind of mountains; they are just like goats. I never drove them across these canyons in between the range I spoke of.

WILLIAM NORRIS, sworn for defendant.

My father was a white man. Am 47 and was born on the Trinity River, on the Hoopa Reservation. Live at Requa and have been acquainted with the Klamath off and on all my life. Have been there since 1887 or 1888. Own land at Requa, and am one of the school trustees of Riverside district, Del Norte County. I was helping in 1902 and 1903 in making surveys for allotting Indians. I know Jimmie Masten's farm; it is below Wahtec village. Have known this farm 7 or 8 years—something like that. Two years ago the same old house was standing on this place as in 1885. It sets about 300 yards from the river. There is willows between the lower side of the orchard and the river. It is about 150 yards from the orchard to the river; 35 or 40 between the house and the river. It was cutting below the orchard the last time I was up there; it was not cutting the orchard. I was acquainted with Joe Dick, an Indian. He has been dead 3 or 4 years; died of consumption. Knew him since he was a boy.

Q. What can you state as to the state of his health along about 1901 and 1902?

The COURT. I can not see the materiality of that, unless you can state it.

A. His health was poor.

The COURT. Do not answer.

Mr. QUINN. Q. Do you know what his health was?

60 The COURT. Strike that out until we hear the materiality of his health is.

Mr. QUINN. The purpose of it, may it please the court, is in reference to the person that sat down after he had proceeded from where this imprint was down the river; that he sat down; and the purpose of it is to connect that with a further statement made to this witness at Requa in reference to the fact that this Joe Dick, this consumptive, confessed to this witness that he was the person that shot Chickasaw; that he was up at a place where they were picking stuff above the Sebastian ranch.

The COURT. You mean you propose to introduce by a witness a statement made to him by somebody that is not on trial here.

Mr. QUINN. A confession by another person.

The COURT. No; that would not be admissible; you see, that is purely hearsay.

Mr. BLACK. I object to it as immaterial, irrelevant, and incompetent for any purpose here.

Mr. QUINN. I desire to take an exception to the ruling of the court.

Mr. QUINN. In order to save my rights in the matter, I desire to ask the witness the further question and get the ruling.

Mr. QUINN. Q. Did he make any statement to you in reference to who it was that shot this Indian, Chickasaw, and what they got for shooting this Indian?

Mr. BLACK. To that we object, unless it implicates this defendant, on the ground that it is immaterial, irrelevant, and incompetent.

The COURT. You propose by that to implicate this defendant?

Mr. QUINN. I do not. This is with reference to the third party, to the party speaking, Joe Dick.

The COURT. In other words, in line with what you stated a moment ago.

61 Mr. QUINN. Yes.

The COURT. The objection will be sustained.

Mr. QUINN. Exception.

Mrs. CATHERINE GOODWIN, sworn for defendant.

I live on the Klamath, on this side, opposite from the post-office. I am a sister of the defendant. Went to live on the Klamath in 1885. I was 36 my last birthday. Was born in Del Norte County. My father was a white man, who came from Ireland to this country when he was six years old. He died in 1887, two years after we went to live there. We lived on the Old Dick place, about a mile this side of the Klamath up from the post-office and on the opposite side. I knew the Jimmy Masten place, once occupied by Henry Griffin. It is about a mile, maybe more, maybe less, from Johnson's; am not a good judge of distances. In 1885 a man and his family by the name of Ayers occupied the house on this place. He was a white man. The house is setting in the same place now as then, though it may be a different house. It is near a spring. Have passed up and down Klamath River quite often. The house is 300 or 400 yards from the river; perhaps further. There is 2½ or 3 acres in the orchard. It is longer than wide, following the banks of the river. High water was the same in 1886 as when I left in 1900, and in the same place when I came back as when I left in 1900.

Mr. BLACK. Q. Do you mean the high bank?

Mr. QUINN. Ordinary high-water mark.

Mr. BLACK. Q. Is that what you mean by the high bank of the river?

Mr. QUINN. I do not mean the point where the highest water has been on what you call the high bank, but the mark that is left by

the river where it shows as far as the water ordinarily goes each winter; not any extreme freshet, I mean.

62 It is 25 miles from Johnson's to Requa. I know where the landing is used by those who live at Wahtec village and where the landing is for the freight brought up the river from Requa to Johnston's store. When we first went there freight was brought in by pack trains; then after it was always boated up the river. Yockter Sam was an Indian who had a boat for this purpose. The boats used were double ended dug-outs, propelled by oars or paddles. They cannot row up the river; it is too swift. They pole up. There is not time of years that the river is impassable. They boat up all summer long. The river empties into the ocean below Requa. Small boats run from the ocean to the cannery at Requa at the mouth. I don't know that they can not run up the river; they come to take fish from the cannery. Besides these Indian boats or dug-outs, they run small launches up the river. Sixty or sixty-five sacks of flour and a few kegs of nails is an ordinary load. Am acquainted with a mine in the vicinity of Johnson's or Wahtec. Knew Joe Dick in 1900. He was a consumptive for several years. The last time I saw him he was a shadow of a man.

Cross-examination:

In the summer time in bringing the boats up the river, the men would have to get out and pull the boats over the riffles, where it is very swift.

JAMES DONNELLY recalled.

Am a voter and voted ever since I was twenty-one, and my average weight is 133.

(The defense then introduced three registration certificates showing that the defendant was a registered voter in Mettah precinct, Humboldt County, California, for the year 1904, 1906, and 1908.)

The defense also introduced the naturalization papers of James Donnelly, issued by the Superior Court of Humboldt County,

63 California, showing James Donnelly became a naturalized citizen in 1879, and that he was a native of Ireland.

During the examination of Mrs. Catherine Goodwin, the defense introduced in evidence a certified copy of the original official map of township 11 north, range 3 east, Humboldt meridian, on file in the surveyor's-general office at San Francisco, which map shows the location of Pecwan, Pecwan Creek, Johnson's store, and Wahtek village, showing that Wahtek village is situated in lot 8 of said township, and that said lots 8 and 9 comprised the south half of the southeast quarter of said section 7, less the portion occupied by the river. This map further shows that the Klamath River opposite Johnson's store runs in a northwesterly direction, and that this river formed the southern boundary or said lots 8 and 9.

A certified copy of a mining location filed October 20, 1888, in the recorder's office of Humboldt County, California, was introduced, of which the following is a copy:

"Notice is hereby given that the undersigned, having complied with the requirements of Chapter A of Title 32, of the Revised Statutes of the United States, and the local customs, laws, and regulations, have located 20 acres each of placer mining ground, situated in the county of Humboldt and State of California, and described as follows:

"The northwest quarter of the northwest quarter of section 17; the north half of the northeast quarter of the northeast quarter of section 18; the south half of the southeast quarter of section 7; and the south half of the southwest quarter of the southwest quarter of section 8; all in township 11 north of range 3 east of Humboldt meridian.

"This claim shall be known as the 'Klamath Bluffs Hydraulic Gold Mining Claim.'

64 "Dated October 9, 1888.

J. E. STUART.
J. M. WHITE.
M. MILLER.
D. M. SHORT.
J. W. ELLYSON.
W. H. ROBINSON.
C. G. ROBINSON.
F. ROBINSON.

Witness:
W. M. CLEVELAND.
G. L. LEWIS.

"Recorded at the request of W. F. Shelton Oct. 20, 1888, at 5 min. past 9 a. m.

"GEO. A. KELLOGG, *Recorder.*"

Two certified copies of two orders of the board of supervisors of Humboldt County showing first the creation of the Mettah school district which included within its boundaries the premises upon which the alleged homicide took place and which was created prior to October, 1891, and secondly showing that out of said Mettah school district, after the creation of said extension, Humboldt County created a second school district called Florence and which district includes the premises upon which said homicide took place.

The field notes of the survey of the above mentioned township were introduced showing the Ayers house to set back from the meander line of the Klamath River about 266 yards. The survey was taken in 1886. The general description of said township in the field notes was as follows, to-wit: (Insert here defendant's Exhibit 2.)

65 Defendant then rested.

JAMES MASTEN, recalled on rebuttal, for the Government.

There is a trail above the house running to Pecwan. Went over it lots of times. You have to go above my place and it comes down

to above by the schoolhouse; that is as far as I ever go. That is the trail to Wahtec. There are two trails I know of leading to Pecwan; one about a mile from the ranch that they call Nora's place. I have rode there lots of times looking for my cattle. Another about a half a mile. You cannot ridge a horse on it. Going from my place to Pecwan following either of these trails, I have never tried and I don't know how long it would take me. It is about 3 miles, I guess. If I was going right along travelling, it ought to take me an hour and a half crossing lots of gulches.

Cross-examination:

In order to keep out of sight from the village of Wahtec and the people living on the banks of the river, they would have to stay above my ranch clear up to Nora's. A person on that prairie could be seen from Wahtec easy. When I stay on my place, I could see all over clear up if I wanted to see anybody. Nora's place is about a mile from the ranch on top at the end of the prairie pretty near. One trail goes over to Pecwan and the other right up to the hills to the top. From the top of Pecwan prairie to Pecwan is about a mile; about a half a mile to Pecwan where this trail comes out on Pecwan prairie. The prairie continues up the mountain side above my ranch. If a person stayed out of sight of Johnson's and Wahtec village above the top of the prairie, I don't know how far it would be over to Pecwan prairie. On this territory I call prairie there is sometimes a tree, then a strip, then you come to a prairie, then a
66 strip of scrubby timber; that is why we call it prairie—not large timber on it. It is clear, often without any trees on it, right up the hill pretty nearly a mile from Henry Griffin's place.

Redirect examination:

No streams or gulches on that prairie. A little creek between my place and Chickasaw's with a pretty steep bank. Going through a strip of woods through that ravine, you could keep out of sight. That creek is by where Henry Griffin lives. Then you cut out on the prairie again; then you go through scrubby oak and come out above there. At Johnson's there is another strip of prairie; then you go to a strip of wood called Corda Creek; then it is prairie again.

Paul Smith, sworn for the Government on rebuttal.

I live at Requa and am deputy sheriff and fish commissioner there in Del Norte County. Have lived there six years. Have known William Norris for six years and his general reputation for truth in the community where he lives is not very good. Steamboats and gasoline engines at certain times can go up the Klamath River about 28 miles. At certain times in the summer they cannot go above six miles.

Cross-examination:

At the Klamath where I live is an old settled community. It is at Requa towards the mouth. I live across the river from the River-

side school district about half. You can look across from my house to the school. Have been up to Johnson's a good many times.

Q. Will you swear that during the summer months of any year for 20 years that double-ended boats, dugouts carrying a ton and a half or two tons, cannot go up that river?

A. Any time in the year?

Q. Yes.

A. Yes, sir; I will. Blue Creek is six miles below Johnson's, nearer the ocean.

67 Q. Will you swear that the Klamath River is not navigable from Blue Creek up to Johnson's; that launches and boats cannot go up and down the river there?

A. I don't know anything about that.

Q. At Johnson's?

A. No, sir. I do not know anything about the country in there in the summer time. I know it from Blue Creek down in the summer time. I know that the freight is and has been for years brought in the fall of the year from Requa up the river, the supplies for Johnson's store, whenever there is a swell in the river. That is the time they bring the freight up. They use small canoes to take the freight up 3½ to 4 feet beam and 18 to 20 feet long. They push them. In most of the places where it is swift, they bridle them and use a tow on the riffles.

William Norris fishes in the summer and owns a little ranch there. I don't know whether he owns it now or not. The last I heard of him he was clerk of the board of trustees of the Riverside school district and has held that position for six years.

JOHN BIGFIRE, sworn for the Government on rebuttal.

I live at Requa. Don't understand English. I knew the Indian Chickasaw after he was killed. I stayed at Dock Joe's sweathouse at Pecwan the night before Chickasaw was killed, not far from the house Jimmy Donnelly lived in.

Q. What time did you get up and have your breakfast that morning?

A. I got up early and went up there after the sunrise. After sunrise I went up to call on Pecwan Billie, and no one was at home. He lived a short distance from Jimmie Donnelly; I did not measure it. It was a little further than the distance of this courtroom. After I found nobody at home at Pecwan Billie's, thought I would go to Jimmie Donnelly's house. When I went to Jimmie Donnelly's house, the old man and the old woman were there, he is now

68 dead. I did not see Jimmie Donnelly, Rosa Jackson, or Jimmie Donnelly's wife there. It was just one room and I went inside. I don't know where Jimmie Donnelly was then. It was after sunrise. I then went down to Johnson's and on my way down I heard Chickasaw was killed, from Ed James, on the road to Johnson's.

Cross-examination:

When I saw this old couple, the sun was not very high in the heavens. It was not very hot, but it was warm.

MILTON J. THOMPSON, sworn for the Government on rebuttal.

Have been living at Eureka four years, and before that I lived 29 years on the Klamath. Was married there. I am familiar with the Lower Klamath Indian customs and know their talk well enough to get along with them. Have known Jimmie Donnelly for 24 or 25 years and we always considered him a first-class shot. I remember the fact of Chickasaw being killed and the day on which he was killed. I was living close by; got my supplies at the store and my mail at the post-office right there. I know the Sebastian place or where Henry Griffin lived in 1901–2. I settled the place in the first place and improved it by putting up fences, house and barn, cultivating the land and planting an orchard. It is the same orchard that was there in 1901. Where the orchard stands, it is sandy bar land made by the river on a curve; through this sandy loam there is a creek running which is quite a creek in the winter time. The orchard was below this creek, as was also all the buildings. The orchard went not exactly to the high bank of the river but close to it. There was a fence enclosing the orchard that was sometimes washed away next to the river and put back. I don't know whether it was fenced at that time but I suppose it was.

69 If a man was standing on the bar where the orchard is down next to the bank where it drops off and a man was going around the trail that goes between the orchard and the house, he would not go a great distance until he would come to a bluff point and be out of sight from anyone about the place or house. I was at the Klamath post-office the day after Chickasaw was killed. I was at Johnson's store at the Klamath post-office and saw James Donnelly there and he was fixing and half-soling his shoes, had a shoe last. He was fixing one and when he got that fixed he put it on and took the other off. He was putting a sole on the bottom, driving tacks in.

Cross-examination:

He was doing what we call half soling and putting extra tacks in the soles. It was the next day after Chickasaw was killed. I am married to a native Klamath woman; married her according to Indian law and also under states laws; double married. I lived in the house I spoke of and sold it to Bill Ayers, editor of the Western Watchman. I did not go and look at Chickasaw's body. I know he was killed the day before, as one can know of it of his own knowledge when everybody is talking about it. It was common talk, like anyone talks of murder. The store at Johnson's is old; put up in 1855; afterwards made into a sort of a fort. When Bill McGarvey took the store he had an iron shoe last made so that all hands around there

could have this last and fix their shoes. They took this shoe last all over the village. I borrowed it many a time. There was no regular cobbler there. He was pretty handy at fixing his shoes and a good many others. The defendant had me arrested once. They stole my things and when I went and got them they had me arrested for burglary and acknowledged that it was mine. I had trouble with the defendant over a mine, but not so much with him as the
70 others; he was one of them that had me arrested.

Same witness recalled.

It would take half an hour, using either one of these trails, to go over to Pecwan from Henry Griffin's place.

Cross-examination:

It is about a mile and a quarter to the top of the hill. But they don't go a quarter of the way up to go across; there are cross trails. A person who wanted to keep out of sight could keep to the creek; he would not have to go to the top of the ridge. From the Sebastian mine to this house I lived in is about 350 or 400 yards. You can go on these trails without being seen from the river front. There are creeks and timber and brush, open places and flats. The creek comes east of my house. To the north there is another one. The prairie, right at the house, goes up the mountain a half to three-quarters of a mile and skirts off.

Mrs. LUCY THOMPSON, sworn for the Government on rebuttal.

I am the wife of Milton J. Thompson. I know the defendant, James Donnelly, since he was a boy. I was at the Klamath post-office the next day after Chickasaw was killed and saw Jimmie Donnelly fixing soles on his shoes in Johnson's store, right in the kitchen. He was fixing both shoes, putting soles on them.

F. W. TAFT, sworn for defendant on rebuttal.

I have resided in Del Norte County. Am now living in Alameda, and came here last July. Lived in Del Norte County nine years. I was district attorney of Del Norte County for one term. I am acquainted with that part of Del Norte County called Requa, and have been since 1899. Am very well acquainted with the people in and around Requa and that neighborhood. Have known William Norris for eight years, and I know his reputation as to truth and veracity in the community in which he lives, and it is good.

71 JAMES DONNELLY, recalled for himself on rebuttal:

On the opposite side of the river from Johnson's there are many houses. There is a good view of the mountains and prairies above Johnson's from the opposite side of the river. You can see all over the side hill. From the south side of the river a person crossing the strips of prairies above Johnson's could be seen. Johnson, a white man, had charge of the store at Johnson's at the time Chickasaw was killed. He had been there ever since I remember and per-

sonally conducted the store. He lived in the same building where the store was and the post-office. The people that bought shoes there always got their shoes tacked and half soled. He kept a last there and hammer and all. It was for every one around there to use it for that purpose. The people that went hunting and climbing the mountains around there did not wear smoothe shoes. They put in their shoes hob nails and tacks; hungarian tacks. They put them in themselves.

Q. During the fall that Chickasaw was killed do you remember whether or not you placed any hobnails in the shoes which you may have gotten or purchased at any place?

A. Yes, sir. I do not remember whether it was before or after. Placing hob nails in shoes does not refer to new soles. There are times that people half soled their shoes and tacked them; I generally put tacks in my shoes. I put hob nails in the soles of them to keep them from slipping; pretty near every one around there used hob nails. The country around where I was working that summer was level, not mountainous. The next day after Chickasaw was killed I was at Pecwan packing wood. I saw a fellow by the name of Redwood Henry and Jimmie Shreghorn and several others from the ranch going down to Wahtec, going to the funeral. I do not remember seeing Mr. Thompson at Johnson's the next day. I was
72 not at Johnson's the next day. I did not go to the funeral.

The foregoing comprises all the material testimony introduced during the trial of said cause.

The court gave the following instructions orally to the jury:

GENTLEMEN OF THE JURY: I shall now ask your very careful and painstaking attention while I proceed to submit to you the law that must govern you in your deliberations on the evidence in this case in reaching a verdict.

This case is of great importance, not only to the defendant, but to the Government as well; but at the same time the principles that apply to it, and which will be submitted for your consideration are not intricate, but are more or less simple, and yet I ask your close attention because it is only by the application of those principles to the evidence and circumstances that have been laid before you that you can intelligently consider that evidence.

The defendant, James Donnelly, is charged in the indictment which has been read to you with the crime of murder, alleged to have been committed within the limits or what is known as the extension of the Hoopa Valley Indian Reservation, in this district, in killing one Chickasaw, an Indian; it being charged in substance that on the first day of October, 1902, the defendant inflicted a mortal wound by shooting the said Chickasaw, from which wound the latter thereafter died on the same day. At the time of the alleged commission of this offense there were but two kinds of felonious homicide recognized by the federal statutes, murder and manslaughter, and murder was not divided into degrees. In this case there is

no evidence which would justify the jury in finding a verdict of manslaughter, since under the evidence, if the defendant is guilty, he is guilty of murder; and it will therefore be unnecessary for me to define to you the lesser offense of manslaughter.

73 Murder is the unlawful killing of a human being with malice aforethought, either express or implied. Malice is an essential ingredient in the crime of murder and serves to distinguish it from the lesser degree of felonious homicide which I have mentioned, to wit, manslaughter.

It is not easy to define the term "malice" in words simpler than the term itself. While in its popular sense the word is commonly used to denote mere hatred or ill will, in its legal and more technical sense, as involved in this charge, it imports a will or purpose to injure or do harm to another, established by proof or presumption of law; a state of mind impelling one to commit an act intentionally and unlawfully to injure another, without legal justification or excuse. "Malice" as here employed is either express or implied. It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature; the premeditation and design being shown from external circumstances, such as lying in wait or stealing upon an intended victim without warning. It is implied when no considerable provocation appears or when the circumstances attending the killing show an abandoned and malignant heart. Implied malice is an inference of the law drawn from any deliberate and cruel act committed by one person against another without just cause or excuse. The two kinds of malice, therefore, indicate but one state of mind, established in different ways, the one by showing premeditation of the homicide, the other by an inference of the law drawn from the act committed.

The term "willfully" as used in the indictment, when applied as here to the intent with which the act was done, implies simply a willingness or readiness knowingly to commit the act involved in the charge.

74 With reference to the offense here charged you will understand that the precise date upon which the act is alleged in the indictment to have been committed, if you find it was committed, is not material; it is sufficient if the evidence establishes that the offense charged was committed by the defendant at any time prior to the filing of the indictment in this case, since there is no limitation under the law against the crime of murder. Therefore, if you find that the defendant did, under the circumstances and in the manner charged, take the life of Chickasaw, an Indian, the person named in the indictment, within the limits of the extension of the Hoopa Valley Indian Reservation on some date before the finding of the indictment, then it will be your duty to find the defendant guilty of murder. And you will understand that under the law the extension of the Hoopa Valley Indian Reservation along the Klamath River includes a strip of territory one mile wide on each side of said river from the northern limits of said Hoopa Valley Indian Reservation as originally estab-

lished to a point twenty miles from the mouth of said river, and that any murder committed by an Indian upon another Indian or by a white man upon an Indian or by a man of mixed Indian and white blood upon an Indian within the limits of said reservation or its extension, is within the criminal jurisdiction of this court.

The law requires that in every crime or public offense there must exist a union or joint operation of act and intent. The intent with which an act is committed is manifested by the circumstances connected with the offense, and the sound mind and discretion of the accused, and all persons are of sound mind who are neither idiots nor lunatics, nor affected with insanity.

As to the intent with which an act is committed, it must be arrived at from all the testimony in the case, and all the acts,
75 conduct, and circumstances shown by the evidence in the case.

There are certain presumptions regarding a person's intent by which you must be governed. One is that a malicious and guilty intent is conclusively presumed from the deliberate commission of an unlawful act for the purpose of injuring another. That presumption may not be rebutted by evidence.

There are other presumptions of law bearing on the question which are satisfactory if uncontradicted, but they may be controverted by evidence; they are what are denominated disputable presumptions. For instance, it is always presumed that a person is innocent of a crime of which he stands charged; it is presumed that an unlawful act was done with an unlawful intent; and it is presumed that a person intends the ordinary consequences of his voluntary act. It is therefore under the law your duty in this case to presume that the defendant is innocent until his guilt has been clearly established to a moral certainty and beyond a reasonable doubt—a term I shall hereafter explain and define to you. If, however, the jury find that the defendant killed the deceased, it has a right to presume that such act was done with an unlawful intent, and that the defendant intended the ordinary consequences of his voluntary act.

The burden of proof in a criminal case rests upon the prosecution, which in this case is the United States Government, to establish every material fact upon which conviction depends, to this moral certainty and beyond a reasonable doubt.

The presumption of the defendant's innocence must prevail as against any less degree of proof. You are not permitted to find a fact against the defendant upon a mere preponderance of the evidence, as in a civil case, nor because you may deem that the probabilities point in favor of his guilt; but the evidence must, as I
76 have stated, be such as to clearly satisfy you to a moral certainty and beyond a reasonable doubt before you can find against the defendant upon any fact material to establish his guilt.

The term "reasonable doubt," as its language implies, means a doubt based upon reason, and which is reasonable in view of all the evidence—an honest, substantial misgiving, generated by insufficiency of proof—and not a mere capricious doubt unwarranted by the testi-

mony; nor is it a doubt born of a merciful inclination to permit the defendant to escape a conviction, or prompted by sympathy with him or those connected with him. It must be supported by reason, and not by mere conjecture and idle supposition. It is such a state of mind as a reasonable man may entertain after careful consideration of all the evidence in the case, without bias, prejudice, or interest.

It has been aptly defined by a great judge to be that state of the case which, after an entire comparison and consideration of all the evidence before the jury, leaves their minds in a condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge involved; that is, a degree of certainty which satisfies the reason and judgment and convinces and directs the understanding of those who are bound to act conscientiously upon it.

You will understand from this that the Government is not called upon to prove the facts upon which it relies to a demonstration: that is, beyond all possible doubt. In human affairs absolute certainty is rarely obtainable. From the nature of things moral certainty to a reasonable degree is all that can be obtained on many subjects, and when a full, candid consideration of the evidences produces a moral conviction of guilt and satisfies the mind beyond any reason-
77 able doubt, a mere captious, imaginary, or artificial doubt is of no avail.

You will look, then, to all the evidence appearing in the case, and if you are satisfied of the defendant's guilt to a moral certainty and beyond this reasonable doubt, it will be your duty to convict. If you are not so satisfied, you are bound to give the defendant the benefit of the doubt and acquit him. And you will understand, as I have indicated, that this degree of proof applies to every essential fact necessary to establish the offense. In this case, in order to convict the defendant the Government must prove that Chickasaw, the person named in the indictment, as was as alleged, an Indian; that he was killed by the defendant in the manner alleged at some time before the finding of the indictment; and that the act of killing was committed within the confines of the extension of the Hoopa Valley Indian Reservation heretofore defined to you. If the Government has failed to prove any one of these facts to the degree of certainty I have stated, then the defendant is entitled at your hands to an acquittal. Every intendment of the law is in favor of the defendant's innocence.

In this case the evidence relied upon to establish the killing of Chickasaw by the defendant is what is denominated in the law circumstantial evidence as distinguished from positive evidence. That is, instead of producing an eyewitness to swear that he saw the defendant shoot and kill Chickasaw, the Government has produced evidence to establish a chain of circumstances from which the fact of the killing by the defendant is sought to be deduced. This method of proof is a perfectly competent one and circumstantial evidence is quite as admissible for the purpose as positive testimony of

eyewitnesses. It is a method of establishing the main fact in issue through proving other facts from which the main fact may be presumed or inferred.

78 Presumptions of fact are inferences as to the existence of some fact drawn from the existance of some other fact—inferences which common sense and common experience draws from circumstances usually occurring in such cases. Presumptions of fact are proved from circumstances of a particular case by means of the common experience of mankind. Men are presumed to act ordinarily according to their own interests. It is presumed that regular and ordinary means are adopted for a given end; so, where the means calculated to attain a certain end appear to have been adopted, and the end itself appears to have been attained, it is presumed that the accomplishment of such end was intended.

But where it is sought to establish the commission of crime by circumstantial evidence it is not enough that all the circumstances proved are consistent with and point to the commission of a crime. To authorize a finding upon circumstantial evidence that a crime was committed by a defendant the circumstances must not only be in harmony with the commission of such crime by the defendant, but the circumstances must be of such a character that they cannot be accounted for upon any other reasonable theory than that of defendant's guilt.

To warrant a conviction of crime on circumstantial evidence when independent facts and circumstances are relied upon to establish the truth of the charge, and taken together are regarded as a sufficient basis for a presumption of guilt to a moral certainty and beyond a reasonable doubt, each material independent fact or circumstance necessary to complete such chain or series of independent facts tending to establish a presumption of guilt should be established with the same degree of certainty as the main fact which these inde-

79 pendent circumstances, taken together, tend to establish; that is, each essential independent fact in the chain or series of facts relied upon to establish the main fact must be established to a moral certainty and beyond a reasonable doubt, and if not so established it is your duty to acquit the defendant of this crime.

As I have indicated, circumstantial evidence is the evidence of certain facts from which are to be inferred the existence of other material facts bearing upon the question at issue or the fact to be proved.

To establish the guilt of the defendant by circumstantial evidence, then it is necessary to prove beyond a reasonable doubt and to a moral certainty that the facts from which the conclusion of guilt is to be deduced are true, and then having established the facts to that extent, the deduction from such facts that guilt exists must be the only reasonable deduction that can be drawn from such facts, and if the facts established are capable of an explanation upon any other reasonable theory than the existence of guilt on the part of the de-

fendant, then the jury are bound to accept that theory and find the defendant not guilty.

The test of the sufficiency of the circumstantial evidence in this case on the question of guilt is whether the circumstances as proved are capable of explanation upon any reasonable hypothesis consistent with the nonexistence of such guilt on the part of the defendant, and if they are capable of such explanation, then you cannot find the defendant guilty.

One of the defenses interposed by the defendant in this case is what is known in law as an alibi; that is, that the defendant was at another place at the time of the alleged killing of Chickasaw. Such a defense is as proper and legitimate, if proved, as any other, and all the evidence bearing upon that point should
80 be carefully considered by the jury, and if, in view of all the evidence, the jury have any reasonable doubt as to whether the defendant was in some other place when the killing took place you should give the defendant the benefit of such doubt, and find him not guilty.

You have doubted less observed as suggested to you by defendant's counsel in argument that no direct evidence has been offered by the Government on the question of motive on the part of the defendant for the alleged taking of Chickasaw's life. While a specific motive is not a substantive part of the offense and is, therefore, not required to be established, it is generally a more or less potent factor tending to show guilt when some motive appears, and its absence is always a circumstance which the jury have a right to consider as tending more or less according to the circumstances, in favor of innocence. As I have said, however, motive is not an essential feature of the offense, nor required to be proven; and if the evidence satisfies you of the defendant's guilt you should so find, notwithstanding no motive appears.

The question of the guilt or innocence of the defendant is addressed solely to you for determination, subject to such instructions as to the law, as the court may give you. By the principles of law given you by the court, you are bound and must apply them to the evidence in reaching your verdict. You will weigh carefully all the testimony and evidence before you, treating it calmly and dispassionately, and from your entire consideration of that evidence arrive at your verdict as to whether the defendant is guilty or innocent.

You are the exclusive judges of the credibility of the witnesses, and in passing upon their credibility you have a right to take into consideration their appearance and demeanor on the stand,
81 their apparent interest or lack of interest in the result of the trial, how far their testimony accords with the other evidence and physical circumstances appearing in the case, and the probability or improbability of their statements when compared therewith and how far they have been influenced by enmity or prejudice if at all against the defendant or bias in his favor.

In weighing the evidence of any witness testifying to declarations or statements claimed by such witness to have been made by defendant, the jury may take into consideration whether or not such witness has any feeling or bias or ill will against the defendant, and if the jury believe any witness has such feeling, bias, or ill will against the defendant, such fact may be considered in determining the degree of credit they will accord such witness.

You will give such credit to the testimony of each of the witnesses in this case as under all the circumstances appearing you believe it entitled to. You are not absolutely bound to believe the testimony of any witness to be true, unless it accords with your reason, and you should not do so if you are satisfied from all the facts and circumstances proven at the trial that such witness has wilfully and intentionally testified to material facts in the case which he knew to be untrue. And if you believe that any witness has wilfully testified to any material fact in the case which he knew to be false, then you should distrust his testimony in other respects and you may reject it entirely if your judgment so dictates.

While, as I have suggested, you are not bound to believe the testimony of a witness, you should bear in mind that every witness is presumed to speak the truth, and you are primarily to accord to him that presumption, and you are not permitted to ignore those rules which should govern you in arriving at a determination as to
82 the witness's credibility from mere arbitrary desire or caprice on your part. You are to test each witness's testimony who has come on the witness stand by those rules which I have given you, and if under these rules you think you cannot accord credit to a witness, in whole or in part, then you are not bound to do so. That is all that is meant when you are told you are not bound to believe the testimony of any witness. In other words, you are to use your reason. You should be neither too credulous nor too skeptical. As that great writer on the law of evidence, Mr. Greenleaf, has aptly said: "While unbounded credulity is the attribute of weak minds which seldom think or reason at all, unlimited skepticism belongs only to those who make their own knowledge and observation the exclusive standard of probability." Neither of these extremes should be indulged by you.

The defendant has been examined as a witness upon his own behalf. This is his legal right, and you should not discredit or disregard his testimony on the ground alone that he is the defendant and stands charged with the commission of a crime. You must consider his testimony fairly and impartially in connection with all the evidence in the case, and give to it such weight as it is fairly entitled to; you should apply the same general rules in determining his credibility as you do that of any other witness. If his testimony, when considered in the light of the other evidence, carries with it a belief in its truth, you should act upon it the same as you would upon that of any other witness. But, as with any other interested witness, you

have a right to consider the interest he has in the case and the result that may flow to him from your verdict, and determine to what extent, if any, it may have influenced his testimony.

Now, gentlemen of the jury, if in accordance with the prin-
83 ciples that I have stated to you, you should find that the defendant at some time prior to the filing of this indictment, under the circumstances and in the manner charged in the indictment, killed the deceased, Chickasaw, that Chickasaw was an Indian, and that the killing took place upon the reservation, which is charged in the indictment, it will be your duty to find a verdict of guilty against this defendant. If, as I have stated, you have a reasonable doubt as to any essential fact which goes to sustain that charge, then you will find the defendant not guilty. If you find the defendant guilty, as I have charged you, there is but one offense which is susceptible of being made the result of your verdict in this case, and that is murder, because there is no room for the play of discretion which would result in bringing about a verdict of manslaughter. Where the evidence, as in this case, tends to show a case of lying in wait and shooting from ambush, the result, if it is death to the victim, can only be murder in such a case, because it requires deliberation, it requires premeditation; therefore it is that I have charged you that there is but one verdict in this case if the defendant is guilty; that is murder. If you find the defendant guilty of murder, the law provides that you have the discretion to fix his punishment as between death and imprisonment for life, to be expressed in your verdict. Should your verdict be "guilty as charged," and say nothing more, the defendant will suffer death. But if you find him guilty as charged and desire that his punishment be less than that of death, then you will add appropriate words to express that purpose. If you find a verdict of not guilty, then you will express that in the appropriate form. The clerk will hand you forms of verdict that express these various findings, anyone of which you may on agreement bring in.

84 You all understand that in a criminal case the verdict of the jury must be unanimous.

You can now retire and remain in charge of the marshal until you arrive at a verdict.

The following instructions were requested by the defendant and refused by the court:

1.

The indictment alleges that the offense set up therein was committed within what is called the extension of the Hoopa Valley Indian Reservation in Humboldt County, California, and you are hereby instructed that this extension consists of a strip of territory one mile in width on each side of the Klamath River, from the northern limits of said Hoopa Valley Reservation to a point twenty miles

from the mouth of said river, excluding from the limits thereof any land to which valid rights may have attached.

2.

You are instructed that the Klamath River is not within the limits of said extension, and if the alleged crime described in the indictment was committed on said river, then the evidence has failed to establish the jurisdiction of this court to try this defendant, and your verdict, under such circumstances, should be not guilty.

3.

You are instructed that if you believe a crime was committed, but you also believe that it was committed between high and low water mark on the Klamath River, then you can not find the defendant guilty in this case, because, under such circumstances, this court would have no jurisdiction of such an offense committed within such limits or in such a place.

85

4.

You are instructed that the burden is on the Government to show that the defendant committed the offense within the limits of said extension, and even if you believe the defendant did commit the offense, yet if you are not satisfied beyond a reasonable doubt and to a moral certainty that the offense was committed within the limits of said extension, then you must find the defendant not guilty.

The following exception was allowed, to the court's giving or refusing instructions, to wit: The defendant excepts to each and every instruction requested by the Government, and given by the court, and to each and every instruction requested by the Government and modified, and given as so modified, by the court, and to each and every instruction requested by the defendant and refused by the court, or given as so modified, and to each and every instruction given by the court of its own motion.

On February 15, 1910, the following order was made and entered in said cause, to wit:

(Title of court and cause.)

"In accordance with the stipulation hereto annexed, it is hereby ordered that the defendant in the above-entitled action shall have to and including the 28th day of February, 1910, in which to prepare, serve, and file his proposed bill of exceptions, to be on motion in arrest of judgment or for a new trial or on appeal.

"Dated February 14, 1910.

"WM. C. VAN FLEET,

"*Judge of the District Court, Northern District of California.*"

86 (Endorsed:) #2186. Filed Feb. 15-1910. Southard Hoffman, clerk. By W. B. Maling, deputy clerk.

February 28th, 1910, having been set as the time for pronouncing judgment, defendant appeared in court for sentence. On being asked if he had any reason why judgment should not be pronounced, the defendant moved the court to vacate and set aside the verdict herein and to grant a new trial upon the following grounds, to wit:

1. Insufficiency of the evidence to justify the verdict.
2. That the verdict is against law.
3. Error in law occurring at the trial.
4. Newly discovered evidence, material for the defendant, which he could not, with reasonable diligence, have discovered and produced at the trial.

In support of said motion for a new trial, the defendant thereupon filed the following affidavits:

Affidavit of Henry George.

(Title of court and cause.)

STATE OF CALIFORNIA,
County of Del Norte.

On this 21 of February in the year 1910 before me George W. Hopper a notary public for Del Norte County California, personally appeared Henry George being duly sworn deposes and says that he came to where Chickasaw was killed between 9 and 10 o'clock in the morning that he was killed he went to the house where Chickasaw was laid out there were a lot of people thare when i first heard it i was at johnsons store i went to the house i went from there down to
87 whare we started to follow the tracks there was James Mastin. Jimmy. Segon johnny. Doe Big. Fire. i went to the first creek and came back the others went on i did not see eny work of eny kind on the shoe print i heard Henry Griffin make the remark he wondered why he did not see the man as he ran by thare. Henry Griffin was with me went to the first creek and came back when i did when we were at the creek is when Griffin made the remark i wonder why i did not see the man as he went up the creek after Griffin made the remark we found the tracks turned down the creek and on down the river then I and Griffin went back to jimmy Mastins store and all the people there was wondering who could have killed Chickasaw when we got to Mastin's store James Donnelly was thare.

HENRY (his x) GEORGE.

In witness whereof i have set my hand and affixed my official seal at Requa County of Del Norte State of California the day and year above mentioned.

[SEAL] GEORGE W. HOPPER
Notary Public in and Del Norte County California.

Filed Feb 28 1910. Southard Hoffman, clerk. By W. B. Maling, deputy clerk.

Affidavit of Charles Mack.

(Title of court and cause.)

STATE OF CALIFORNIA,
County of Del Norte.

On this the 21 of february 1910 before me George W. Hopper a notary public in and for del norte County personly apeard Charles Mack being duly sworn deposes and says that he was stopping with the old man Chickasaw on the day of his death that he was first
88 found by a small boy about 10 years old and then told me and i was the next person to him the old man chickasaw had left the house about 20 minits before he was found dead by the boy the next person was a man by the name of solomon i asked him to help me lift him out of the water he first refused but in a few minits came and helped me move him upon dry ground the old lady chickasaw was crying and making a great deal of noise then lots of people came Henry Griffin was living about ½ mile from the place where Chickasaw was killed and knew nothing about it until he heard the old woman crying

CHARLES (his x) MACH

In witness whereof I have hereunto set my hand seal at Requa County of Del Norte State of California the day and year in this first mentioned.

[SEAL] GEORGE W. HOPPER
Notary Public in and for Del Norte County, California.

Endorsed #2186. Filed Feb. 28, 1910. Southard Hoffman, clerk. By W. B. Maling, deputy clerk.

Affidavit of James Donnelly.

(Title of court and cause.)

UNITED STATES OF AMERICA,
Northern District of California,
City and County of San Francisco, ss:

James Donnelly, being first duly sworn, deposes and says: That he is the defendant in the above-entitled action; that the day Chickasaw was killed he was not at any time down on the bar where the said Chickasaw was found dead; that when he arrived
89 at the village of Wautek, those who had followed the track down the river had already returned, and that defendant did not know at that time who had actually followed said track down the river; that the only persons he knew at that time or since were James Shragon, Jimmy Masten, Henry Griffin, and Warren Hancorne; that at the time of his arrest he only know or heard of said persons being down there on the bar and having followed the track; that the only persons that your affiant knew of at the time of his arrest and up

to the commencement of the trial of this cause were the following: Lulu Donnelly, Rosa Jackson, Catherine Goodwin, James Shragon, Charles Stevens, Seely Griffin, Warren Hancorne, Nellie (Mrs. Blue Creek Sam), who would be of any assistance in his defense, with the exception of William Norris and William Lawson, two witnesses that your affiant was only able to secure after the commencement of the trial of this case. Your affiant further avers that he never knew of or heard that Henry George was a witness or a person who had followed the tracks down the river or that he had heard Henry Griffin make any remarks in reference to wondering why he had not seen the person that morning going up the creek; that your affiant never informed his attorney of any witnesses, as your affiant never knew of any except those hereinbefore mentioned; that the 28th day of February, 1910, was the first time that your affiant ever knew or heard that Henry George knew anything about this case or that he would be any assistance to your affiant in the trial hereof.

That your affiant always heard that a little boy, four or five years old, was the one to discover Chickasaw, but that he was so young and it being so long since the death of Chickasaw that his testimony would be of very little value; that your affiant did not know
90 that Charlie Mack, who now lives in Crescent City and works there at a sawmill, was the person who carried Chickasaw out of the water, or that the said Mack was at the house of Chickasaw just before his death.

That for the foregoing reasons your affiant could not, with reasonable diligence, have procured or produced said witnesses at the trial of this cause.

Dated February 28, 1910.

JAMES DONNELLY.

Subscribed and sworn to before me this 28th day of February, 1910.

W. B. MALING,
Deputy Clerk U. S. Circuit Court,
Northern District of California.

(Endorsed:) #2186. Filed February 28, 1910. Southard Hoffman, clerk. By W. B. Maling, deputy clerk.

Affidavit of J. F. Quinn.

91 (Title of court and cause.)

UNITED STATES OF AMERICA,
Northern District of California,
City and County of San Francisco, ss:

J. F. Quinn, being duly sworn, says: That he is the attorney for the plaintiff in the above-entitled cause, and that he visited the Klamath River the first week in January, 1910, for the purposes of looking into the defense of the defendant, and securing witnesses in his behalf; that he visited the village of Wautek during said visit,

and made many and numerous inquiries as to who followed the track down the river, and who it was that first discovered Chickasaw; that in all his inquiries your affiant never was informed that Henry George knew anything at all about this case, either as to following tracks, or hearing material remarks in relation thereto, and that your affiant never heard of Henry George until February 26th, 1910, when your affiant received a letter from Del Norte County containing the affidavit of the said Henry George; that your affiant had a great deal of difficulty while on the Klamath River, and especially at the vilage of Wautek, in finding out anything about this case, on account of the opposition of James Masten, who informed affiant, upon calling upon him, or rather who made the remark, "Don't you know they kill white man on the Klamath River?" and was trembling when he made said remark, and also on account of the opposition of Indians to the interference on the part of the Government or white people, into what they believe to be a matter to be decided among themselves.

Dated February 28th, 1910.

J. F. QUINN.

Subscribed and sworn to before me this 28th day of February, 1910.

[SEAL.]

W. B. MALING,
Deputy Clerk U. S. Circuit Court,
Northern District of California.

92 (Endorsed: Filed February 28, 1910. Southard Hoffman, clerk. By W. B. Maling, deputy clerk.

Upon the making of said motion and the filing of said affidavits, said motion for a new trial was denied by the court.

Upon the denial of said motion for a new trial, defendant then moved the court to arrest the judgment on the following grounds:

That it does not appear from the indictment herein that this court has jurisdiction of the offense alleged therein.

That it does not appear from the indictment that the defendant is an Indian.

Said motion to arrest the judgment was denied by the court and judgment was thereupon pronounced by the court.

After judgment was pronounced, on said 28th day of February, 1910, the following stipulation and order was made and filed in said cause:

(Title of court and cause.)

It is hereby stipulated by and between the parties to the above-entitled action that this cause may be continued into the term commencing March 7, 1910, for the purpose of preparing, serving, filing, allowing, and settling a bill of exceptions on the part of the defendant, to be used on appeal or on a writ of error to the Supreme

Court of the United States, and that the defendant may have to and including the 23rd day of March, 1910, to prepare, serve, and file such a bill of exceptions.

Dated February 28, 1910.

ROBT. T. DEVLIN,
United States Attorney and Attorney for Plaintiff.
J. F. QUINN,
Attorney for Defendant.

93 So ordered.

WM. C. VAN FLEET, *Judge.*

(Endorsed:) #2186. Filed Feb. 28, 1910. Southard Hoffman, clerk. By W. B. Maling, deputy clerk.

On said 28th day of February, 1910, the following stipulation and order was also made and filed in said cause:

(Title of court and cause.)

It is hereby stipulated by and between the parties to the above entitled action that there is good cause for the defendant to have sixty days after the termination of the present term (which term ends on the 6th day of March, 1910) in which to sue out or file a petition for a writ of error in the above entitled cause. This stipulation is intended to give the defendant sixty days after the termination of the present term in which to sue out or file said petition for a writ of error, in accordance with the provisions of sec. 6 of the act of Feb. 6, 1889; 25 Stat., 656.

Dated February 28, 1910.

ROBT. T. DEVLIN.
United States Attorney and Attorney for Plaintiff.
J. F. QUINN.
Attorney for Defendant.

So ordered.

WM. C. VAN FLEET, *Judge.*

(Endorsed:) #2186. Filed Feb. 28, 1910. Southard Hoffman, clerk. By W. B. Maling, deputy clerk.

Rule 75 of said Circuit Court provides, among other things, for the granting of a new trial for the following cause materially
94 affecting the substantial rights of the losing party, to wit:

"Newly discovered evidence material for the party making the application, which he could not with reasonable diligence have discovered and produced at the trial."

The defendant now specifies the following particulars in which the evidence is not sufficient to justify the verdict of the jury or the judgment of the court, to wit:

I.

That the evidence shows that the alleged crime was committed on the Klamath River, Humboldt County, California, between low and ordinary high water mark.

II.

That the evidence shows the alleged crime to have been committed in the Klamath River, a navigable stream.

III.

That there is no evidence showing the defendant to be an Indian or a tribal Indian.

IV.

That the evidence shows that the alleged crime was committed said extension to the Hoopa Valley Reservation, the premises where the alleged crime was committed, was land to which valid rights had attached.

V.

That the evidence does not show that said land or premises where the alleged crime was committed was not land or premises excepted from the provisions of the executive order dated October 16, 1891, creating said extension.

VI.

That the evidence is wholly insufficient to support the verdict in that the evidence of guilt is so slight that it is over-
95 whelmingly overbalanced by the evidence showing innocence.

Wherefore the defendant proposes the foregoing as his bill of exceptions and asks that the same be allowed and settled.

Dated March 19th, 1910.

J. F. QUINN,
Attorney for Defendant.

The foregoing bill of exceptions, prepared and served in the time and in the manner prescribed by law, is hereby agreed to be correct and the same may be considered engrossed and the same may be filed as defendant's bill of exceptions.

ROBT. T. DEVLIN,
United States Attorney, Attorney for Plaintiff.

A. P. BLACK,
Assistant U. S. Attorney, of Counsel.

The foregoing bill of exceptions, prepared, served in the time and in the manner prescribed by law, is hereby settled and allowed and certified to be correct.

WM. C. VAN FLEET, *Judge.*

Due service of a copy of the within proposed bill of exceptions is hereby admitted this 23rd day of March, 1910.

ROBT. T. DEVLIN,
United States Attorney and Attorney for Plaintiff.

(Endorsed:) Filed May 5, 1910. Southard Hoffman, clerk. By J. A. Schaertzer, deputy clerk.

95a In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

UNITED STATES, PLAINTIFF,
vs.
JAMES DONNELLY, DEFENDANT.

Stipulation and order extending time to file bill of exceptions.

It is hereby stipulated by and between the parties to the above entitled action that this cause may be continued into the term commencing March 7, 1910, for the purpose of preparing, serving, filing, allowing, and settling a bill of exceptions on the part of the defendant, to be used on appeal or on a writ of error to the Supreme Court of the United States, and that the defendant may have to and including the 23rd day of March, 1910, to prepare, serve, and file such a bill of exceptions.

Dated February 28, 1910.

ROBT. T. DEVLIN,
United States Attorney and Attorney for Plaintiff.
F. F. QUINN,
Attorney for Defendant.

So ordered.

WM. C. VAN FLEET, *Judge.*

(Endorsed:) Filed Feb. 28, 1910. Southard Hoffman, clerk. By W. B. Maling, deputy clerk.

95b In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

UNITED STATES, PLAINTIFF,
vs.
JAMES DONNELLY, DEFENDANT.

Stipulation and order extending time to sue out writ of error.

It is hereby stipulated by and between the parties to the above entitled action that there is good cause for the defendant to have sixty days after the termination of the present term (which term ends on the 6th day of March, 1910), in which to sue out or file a petition for a writ of error in the above entitled cause. This stipula-

tion is intended to give the defendant sixty days after the termination of the present term in which to sue out or file said petition for a writ of error, in accordance with the provisions of sec. 6 of the act of Feb. 6, 1889; 25 Stat., 656.

Dated February 28, 1910.

ROBT. T. DEVLIN,
United States Attorney and Attorney for Plaintiff.
J. F. QUINN,
Attorney for Defendant.

So ordered.

WM. C. VAN FLEET, *Judge.*

(Endorsed:) Filed Feb. 28, 1910. Southard Hoffman, clerk. By W. B. Maling, deputy clerk.

96 In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

THE UNITED STATES OF AMERICA
vs.
JAMES DONNELLY. } No. 2186.

Petition for writ of error.

Comes now the defendant, James Donnelly, in the above entitled action and represents and shows to the court:

That in the above cause defendant was accused of the crime of murder and tried and convicted upon said charge; that after said trial and conviction, this court, on the 28th day of February, 1910, entered a judgment herein against this defendant in which judgment and the proceedings had prior thereinto in this cause, certain errors were committed to the predjudice of this defendant, all of which will more in detail appear from the assignment of errors, filed herewith.

Wherefore, this defendant prays that a writ of error may issue in this behalf out of the Supreme Court of the United States for the correction of the errors so complained of and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the Supreme Court of the United States.

Dated May 3, 1910.

J. F. QUINN,
Attorney for Defendant.

Due service of the within petition for writ of error is hereby admitted this 3rd day of May, 1910.

ROBT. T. DEVLIN,
United States Attorney and Attorney for Plaintiff.

(Endorsed:) Filed May 4, 1910. Southard Hoffman, clerk. By J. A. Schaertzer, deputy clerk.

97 In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

THE UNITED STATES OF AMERICA
vs.
JAMES DONNELLY.
No. 2186.

Assignment of errors.

James Donnelly, the defendant in the above entitled action, having petitioned said court for an order permitting him to prosecute a writ of error to the honorable Supreme Court of the United States from the final judgment made and entered in said cause, now makes, presents, and files the following assignment of errors herein, and says that in the record and proceedings in the above entitled action there is manifest error in this, to wit:

I.

By the record herein it appears that the said Circuit Court erred in denying defendant's motion to dismiss said action, which motion was made on the ground that said court had no jurisdiction of said cause in that the evidence showed that said alleged offense was not committed within the limits of the extension of the Hoopa Valley Indian Reservation in Humboldt County, State of California.

II.

By the record herein it appears that the said Circuit Court erred in denying defendant motion to dismiss said action, which motion was made on the ground that it did not appear from the evidence nor was it alleged in the indictment that the defendant was an Indian.

III.

By the records herein it appears that the said Circuit Court erred in instructing the jury "that any murder committed by
98 an Indian upon another Indian, or by a white man upon an Indian, or by a man of mixed Indian and white blood upon an Indian within the limits of said reservation or its extension, is within the criminal jurisdiction of this court."

IV.

By the records herein it appears that the said Circuit Court erred in refusing to instruct the jury as requested by defendant that the Klamath River was not within the limits of said extension.

V.

By the records it appears that said Circuit Court erred in refusing to instruct the jury as requested by defendant that if they found that the alleged crime was committed between high and low water mark on the Klamath River, that said court would have no jurisdiction of said offense.

VI.

By the records herein it appears that said Circuit Court erred in refusing to instruct the jury as requested by defendant that there was excluded from the limits of said extension any land to which valid rights may have attached.

VII.

By the records herein it appears that said Circuit Court erred in refusing to permit the defendant to introduce evidence to show that Joe Dick, a deceased Indian, had confessed that he had shot and killed the Indian, Chickasaw.

VIII.

By the records herein it appears that said Circuit Court erred in denying defendant's motion for a new trial.

IX.

By the records herein it appears that said Circuit Court erred in denying defendant's motion for a new trial and to set
99 aside the verdict, as the evidence was wholly insufficient to sustain said verdict in that the evidence of guilt was so slight as to be overwhelmingly overbalanced by the evidence showing innocence.

X.

By the records herein it appears that said Circuit Court erred in denying defendant's motion for a new trial and to vacate and set aside the verdict herein, as the evidence showed that said alleged crime was not committed within the limits of said extension and that the defendant was not an Indian.

XI.

By the records herein it appears that the said Circuit Court erred in denying defendant's motion for a new trial, as it was shown by defendant that he had discovered new and material testimony which he could not with due diligence have produced at the trial.

VII.

By the records herein it appears that said Circuit Court erred in denying defendant's motion in arrest of judgment, as it was not alleged that the defendant was an Indian.

XIII.

By the records herein it appears that said Circuit Court erred in denying defendant's motion for a new trial and to set aside and vacate the verdict of the jury for the reason that, as shown by the evidence in this cause, said Circuit Court had no jurisdiction over the place of the committment of the alleged offense, nor had it any jurisdiction of the defendant.

XIV.

By the records herein it appears that the said Circuit Court erred in not giving to the jury an opportunity of dividing the alleged offense into degrees and in failing to submit to said jury a
100 form of verdict covering murder in the second degree and in failing to give the jury an opportunity of finding the defendant guilty of murder in the second degree.

Wherefore said defendant prays that said errors be corrected and the judgment of the Circuit Court reversed, and that he have such other and further relief as he may be entitled.

Dated May 3, 1910.

J. F. QUINN,
Attorney for Defendant.

Due service of the within assignment of error is hereby admitted this 3rd day of May, 1910.

ROBT. T. DEVLIN,
United States Attorney and Attorney for Plaintiff.

(Endorsed:) Filed May 4, 1910. Southard Hoffman, clerk. By J. A. Schaertzer, deputy clerk.

101 In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

UNITED STATES OF AMERICA
vs.
JAMES DONNELLY. } No. 2186.

Order allowing writ of error.

Upon reading and filing the petition for writ of error and assignment of errors filed therewith, it is ordered that a writ of error as prayed for be, and the same is hereby, allowed to have reviewed in

the United States Supreme Court the judgment and the proceedings had prior thereto in this cause.

Dated this 4th day of May, 1910.

WM. C. VAN FLEET, *Judge.*

(Endorsed:) Filed May 4, 1910. Southard Hoffman, clerk. By J. A. Schaertzer, deputy clerk.

102 In the United States Circuit Court, Ninth Judicial Circuit, Northern District of California.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
JAMES DONNELLY, DEFENDANT. } No. 2186.

Clerk's certificate to transcript of record.

I, Southard Hoffman, clerk of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Northern District of California, do hereby certify the foregoing one hundred and one (101) pages, numbered from 1 to 101, inclusive, to be a full, true, and correct copy of the record and proceedings in the above and therein entitled cause, as the same remains of record and on file in the office of the clerk of said Circuit Court, and that the same constitute the return to the annexed writ of error.

I further certify that the cost of preparing and certifying the transcript of record on writ of error in this cause amounts to the sum of $58.00; that said sum will be charged by me in my quarterly account against the United States for the quarter ending June 30, 1910, and that the original writ of error and citation issued in said cause are hereto annexed.

In testimony whereof I have hereunto set my hand and affixed the seal of said Circuit Court this 16th day of June, A. D. 1910.

[SEAL.] SOUTHARD HOFFMAN,
Clerk of the United States Circuit Court,
Ninth Judicial Circuit, Northern District of California.

103 UNITED STATES OF AMERICA, ss.

The President of the United States of America, to the judges of the Circuit Court of the United States, of the Ninth Judicial Circuit, in and for the Northern District of California, Greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said Circuit Court, before you, between the United States of America, plaintiff and defendant in error, and James Donnelly, defendant and plaintiff in error, a manifest error hath happened, to the great damage of the said James

Donnelly, plaintiff in error, as by his complaint appears, and it being fit, that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, in the District of Columbia, on the 2nd day of July, A. D. 1910, next, in the said Supreme Court, to be there and then held, that the record and proceedings aforesaid be inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

Witness, the Hon. Melville W. Fuller, Chief Justice of the United States, this 5th day of May, in the year of our Lord one thousand nine hundred and ten, and of the Independence of the United States the one hundred and thirty-fourth.

[SEAL.] SOUTHARD HOFFMAN,
Clerk U. S. Circuit Court, Northern District of California.

The above writ of error is hereby allowed.

WM. C. VAN FLEET,
United States District Judge.

Service of within writ of error, by copy, admitted this 5th day of May, A. D. 1910.

ROBT. T. DEVLIN,
United States Attorney,
Attorney for Plaintiff and Defendant in Error.

The answer of the judges of the Circuit Court of the United States of the Ninth Judicial Circuit, in and for the Northern District of California.

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under the seal of our said court, to the Supreme Court of the United States, within mentioned, at the day and place within contained, in a certain schedule to this writ annexed as within we are commanded.

By the court.

[SEAL.] SOUTHARD HOFFMAN, *Clerk.*

(Indorsed:) The United States of America, plaintiff and defendant in error, vs. James Donnelly, defendant and plaintiff in error. Writ of error. Filed May 5th, 1910. Southard Hoffman, clerk U. S. Circuit Court, Northern District of California.

104 UNITED STATES OF AMERICA, ss.

To the United States of America, greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held at the city of Washington, in the District of Columbia, on the 2nd day of July, A. D. 1910, pursuant to a writ of error, filed in the clerk's office of the Circuit Court of the United States of the Ninth Judicial Circuit, in and for the Northern District of California, wherein James Donnelly is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable William C. Van Fleet, United States District Judge for the Northern District of California, this 5th day of May, A. D. 1910, and of the Independence of the United States, the one hundred and thirty-fourth.

WM. C. VAN FLEET,
United States District Judge.

104½ Service of within citation, by copy, admitted this 5th day of May, A. D. 1910.

ROBT. T. DEVLIN,
United States Attorney, Attorney for Dft. in Error.

(Indorsed:) In the Supreme Court of the United States. The United States of America, plaintiff and defendant in error, vs. James Donnelly, defendant and plaintiff in error. Citation. Filed May 5th, 1910. Southard Hoffman, clerk U. S. Circuit Court, Northern District of California.

(Indorsement on cover:) File No. 22250. N. California C. C. U. S. Term No., 629. James Donnelly, plaintiff in error vs. The United States. Filed July 2, 1910. File No. 22250.

O

SUPREME COURT OF THE UNITED STATES

October Term, 1910.

No. 629.

JAMES DONNELLY, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

STATEMENT OF THE CASE.

Plaintiff in error was indicted on a charge of murder, and afterwards tried and convicted on said charge in the Circuit court of the United States for the Northern District of California. The jury in their verdict, recommended that the punishment be life imprisonment and plaintiff in error in accordance with said verdict, was sentenced to imprisonment in the United States penitentiary at Leavenworth, Kansas, for the term of his natural life, where he is now incarcerated. Motions for a new trial and in arrest of judgment were denied by the trial court and plaintiff in error has brought the case before the United States Supreme Court upon a writ of error.

Plaintiff in error is accused of the murder of one "Chicksaw," an Indian, within the limits of the extension of the Hoopa Valley Reservation in Humboldt County, State of California. The indictment charges:

"That James Donnelly, late of the Northern District of California, heretofore, to-wit, on the first day of October, in the year of our Lord one thousand nine hundred and two, with force and arms within the limits of a certain Indian Reservation commonly known as and called the extension of the Hoopa Valley Reservation, in the County of Humboldt, in the State and Northern District of California, and within the jurisdiction of this honorable court then and there being, in and upon one "Chickasaw," an Indian, a human being, then and there being within the limits of said Indian reservation at the time and place aforesaid, feloniously, wilfully, unlawfully, and of his malice aforethought, did make an assault; and that the said James Donnelly, a certain gun which was then and there loaded and charged with gun powder and a leaden bullet, which said gun he, the said James Donnelly, in his hands then and there had and held at and against the body of him, the said "Chickasaw," an Indian then and there being as aforesaid, then and there feloniously, wilfully and of his malice aforethought, did shoot off and discharge, and that the said James Donnelly, then and there with the leaden bullet aforesaid, then and there shot off and discharged and sent forth as aforesaid, him, the said "Chickasaw," an Indian, then and there being as aforesaid, in and upon the back part of the body of him, the said "Chickasaw," an Indian then and there feloniously, wilfully, and of his malice aforethought, did strike, penetrate and wound, and did then and there in the manner, and by the means aforesaid, give to him, the said "Chickasaw," an Indian, with the leaden bullet aforesaid, so shot off, discharged, and sent forth as aforesaid, one mortal wound, the width and depth of which said mortal wound is to the grand jurors aforesaid unknown, of which said mortal wound the said "Chickasaw" an Indian within the limits of the said Indian reservation commonly known and called the extension of the Hoopa Valley Reservation, in the County of Humboldt, State and Northern District of California, and within the jurisdiction of this honorable court, then and there, to-wit, on the first day of October, in the year of our Lord one thousand nine hundred and two, died.

"And the grand jurors aforesaid, on their oath aforesaid, do say and represent that the said James Donnelly feloniously, wilfully, and of his malice aforethought, him, the

said "Chickasaw," an Indian, did then and there in the manner and form aforesaid kill and murder."

The indictment was filed October 26th, 1909, at least seven years after the commission of the alleged crime. No motive for the murder was shown and Plaintiff in error was convicted upon circumstantial evidence given by witnesses unfriendly to and with a feeling against him.

Chickasaw, who was an old Indian and a member of the Klamath Tribe, was found lying dead, at the edge of the water of the Klamath river in front of his house and the Indian village where he lived. His body was found between 7 and 8 o'clock in the morning, a shot having been heard in the same vicinity a short time before. As to the date it was not definitely established whether it was the latter part of October, 1901, or 1902. In the immediate vicinity where the body was found there was a river bar, and on this bar about 40 yards from where the body lay, was a clump of willows. The bar was sandy and on the same morning and after the body was found, an impression was found in the sand in this clump of willows indicating that some person had crouched there in a position that one would assume in shooting a gun, while resting on one knee. From this clump of willows footprints led along the bar and down the river. One of the footprints was peculiar showing something wrong with one of the soles of the shoes worn by the person making the track.

It was the contention of the government at the trial that plaintiff in error shot the deceased while in the river bathing from the clump of willows on the bar at about 7 o'clock in the morning and then proceeded down the river bar several hundred yards and then left the river and keeping out of sight

of the villages on each side of the river, near the scene of the alleged crime, reversed his course, crossed the ridges and canyons back from the river, and returned to his home at Pecwan in time to walk back with his wife to the village in front of which the body of the deceased was found and arrive there between 10 and 11 o'clock of the forenoon of the same day.

Plaintiff in error at the time of the death of the said Chickasaw was living with his wife at Pecwan about one and one-half miles up the river from the village where Chickasaw lived and in front of which he was found dead. His wife's parents and sister lived in the same house. Plaintiff in error was at the time about 21 years of age.

Plaintiff in error contends that he was at home at the time of the killing of the deceased, and that he had nothing whatever to do with the murder if there was one, and that the place of the commission of the alleged offense was not within the limits of the extension of said Hoopa Valley Reservation, but on the Klamath river outside of said limits.

The indictment does not allege plaintiff in error to be an Indian, nor did the government attempt to introduce any evidence at the trial to show that he was an Indian.

Plaintiff in error at the conclusion of the government's case moved to have the case dismissed on the ground of lack of jurisdiction in that the indictment did not allege plaintiff in error to be an Indian nor was there any evidence to show that he was such and in that there was no evidence to show that the alleged crime was committed within the limits of the extension of said reservation. The motion was denied and plaintiff in error excepted (Page 22 Trans). The same points with others were urged on motions for a new trial and in arrest of judgment, both of which motions were denied.

The points raised involve questions of jurisdiction, admissibility of evidence and sufficiency of evidence to sustain the verdict of the jury, error in giving and refusing instructions, and error in denying motion for a new trial on the ground of newly discovered evidence, as well as failure to show jurisdiction. Part of the errors appear on the face of the record and part are preserved in a bill of exceptions.

SPECIFICATION OF ERRORS RELIED UPON.

I.

Error of said Circuit Court in denying the motion of plaintiff in error at the close of the government's case to dismiss said action, said motion being made on the ground that said court had no jurisdiction of said action for the following three reasons:

1. That it is not alleged in the indictment that plaintiff in error is an Indian.

2. That the evidence did not show that plaintiff in error was an Indian.

3. That the evidence did not show that the offense was committed within the limits of the extension of the Hoopa Valley Reservation as alleged in the indictment.

II.

Error of said Circuit Court in instructing the jury "That any murder committed by an Indian upon another Indian, or by a white man upon an Indian, or by a man of mixed Indian and white blood upon an Indian, within the limits of said reservation or its extensions, is within the jurisdiction of this Court."

III.

Error of said Circuit Court in refusing to instruct the jury, "The indictment alleges that the offense set up therein was committed within what is called the extension of the Hoopa Valley Indian Reservation in Humboldt County, California, and you are hereby instructed that this extension consists of a strip of territory one mile in width on each side of the Klamath river, from the northern limits of said Hoopa Valley Reservation to a point twenty miles from the mouth of said river, excluding from the limits thereof any land to which valid rights may have attached."

IV.

Error of said Circuit Court in refusing to instruct the jury, "You are instructed that the Klamath River is not within the limits of said extension, and if the alleged crime described in the indictment was committed on said river, then the evidence has failed to establish the jurisdiction of this court to try this defendant, and your verdict, under such circumstances, should be not guilty."

V.

Error in said Circuit Court in refusing to instruct the jury that, "You are instructed that if you believe a crime was committed, but you also believe that it was committed between high and low water mark on the Klamath river, then you cannot find the defendant guilty in this case, because, under such circumstances, this court would have no jurisdiction of such an offense committed within such limits or in such a place."

VI.

Error of said Circuit Court in refusing to instruct the jury that, "You are instructed that the burden is on the government to show that the defendant committed the offense with-

in the limits of said extension, and even if you believe the defendant did commit the offense, yet if you are not satisfied beyond a reasonable doubt and to a moral certainty that the offense was committed within the limits of said extension, then you must find the defendant not guilty."

VII.

Error of said Circuit Court in denying motion for a new trial it appearing on motion therefor:

1. That there was no evidence to show that plaintiff in error was an Indian or that the alleged offense was committed within the limits of an Indian reservation.

2. That plaintiff in error had discovered new and material testimony which he could not with due diligence have produced at the trial.

3. That the evidence of guilt was so slight as to be overwhelmingly overbalanced by the evidence showing innocence.

VIII.

Error of said Circuit Court in denying the motion of plaintiff in arrest of judgment, made on the ground that it was not alleged in the indictment that plaintiff in error was an Indian.

IX.

Error of said Circuit Court in refusing to permit plaintiff in error to introduce evidence to show that Joe Deck, a deceased Indian, had confessed just before his death from consumption, that he had shot and killed the Indian Chickasaw.

ARGUMENT.

ERRORS CONCERNING JURISDICTION.

In order to have given the United States Circuit Court

jurisdiction it was essential to have alleged in the indictment that plaintiff in error was an Indian. This material and necessary element was not alleged in the indictment. (Page 1 Trans.) Neither was it proven or attempted to be proven at the trial that he was an Indian. The government was content to rest its case upon the theory that all that was required to give the court jurisdiction was to allege and establish that the deceased was an Indian. In this respect the position of the government is positively untenable.

This error complained of is not only shown by the transcript of the testimony set forth in the bill of exceptions but also appears on the face of the record. "The question of jurisdiction arises on the record since, if as a matter of law, the reservation was not within the sole and exclusive jurisdiction of the United States, as the indictment fails to charge that the crime was committed by an Indian, it necessarily follows that if the court had jurisdiction only to punish such a crime the want of jurisdiction appears upon the face of the record."

Draper vs. U. S. 164 U. S. 241, 41 L. ed. 420.

The only instance in which the federal courts have jurisdiction of offenses committed within the limits of the Hoopa Valley Indian Reservation or the extension thereof is found in Sec. 9 of the Act of Congress approved March 3, 1885, which is as follows:

"That immediately upon and after the date of the passage of this act all Indians, committing against the person or property of another Indian or other person any of the following crimes, namely, murder, manslaughter, rape, assault with intent to kill, arson, burglary, and larceny within any Territory of the United States, and either within or without

an Indian reservation, shall be subject therefor to the laws of such territory relating to said crimes and shall be tried therefor in the same courts and in the same manner and shall be subject to the same penalties as are all other persons charged with the commission of said crimes, respectively; and the said courts are hereby given jurisdiction in all such cases; and all such Indians committing any of the above crimes against the person or property of another Indian or other person within the boundaries of any State of the United States, and within the limits of any Indian reservation, shall be subject to the same laws, tried in the same courts and in the same manner, and subject to the same penalties as are all other persons committing any of the above crimes within the exclusive jurisdiction of the United States."

This act distinctly provides that Indians shall be amenable to the courts of the United States for the commission of the crime of murder against the person of an Indian or other person. *However it is only Indians that can be proceeded against under this act.*

Section 5339 of the Revised Statutes provides:

"Every person who commits murder:

"First. Within any fort, arsenal, dock-yard, magazine or in any other place or district of country under the exclusive jurisdiction of the United States;

"Second. Or upon the high seas, or in any arm of the sea, or in any river haven, creek, basin, or bay within the admiralty and maritime jurisdiction of the United States, and out of the jurisdiction of any particular State;

"Third. Or who upon any such waters maliciously strikes, stabs, wounds, poisons, or shoots at any other person dies, either on land or at sea, within or without the United States, shall suffer death."

The crime charged was not committed within the limits of any of the places enumerated in the above section and consequently the United States Courts would not have jurisdic-

tion as the Hoopa Valley Reservation is not a place under the exclusive jurisdiction of the United States. If an Indian reservation within a state was on the same footing as a fort or arsenal it would not have been necessary for Congress, in order to make it an offense against the laws of the United States for an Indian to murder an Indian or any other person within the boundaries of any state and within the limits of an Indian reservation, to have enacted Sec. 9 of the Act of March, 1885. It would have been useless legislation. And, again, if an Indian reservation within the limits of a state is a place within the sole and exclusive jurisdiction of the United States, the federal courts would have jurisdiction of the crime of murder committed by any person, whether white or Indian, against another person, whether white or Indian. This, however, has never been conceded to be the law either by the State or the United States courts and the rule is well established that the state and not the United States has jurisdiction of the crime of murder committed within the limits of an Indian reservation within the boundaries of a state by a white person against a white person.

U. S. vs. McBratney, 104 U. S. 621, 26 L. ed. 869.

U. S. vs. Draper, 164 U. S. 240, 41 L. ed. 419.

U. S. vs. Kagama, 118 U. S. 385, 30 L. ed. 228.

Neither is it charged in the indictment that the reservation or the place of the alleged crime is Indian country. In fact this reservation is not Indian country and never was Indian country since California became a part of the United States. The title to land within the limits of its extension has always been since its cession from Mexico in the United States or its grantees. In order to be Indian country the In-

dians must retain their original title to the soil, and this extension does not include any land to which the original Indian title has never been extinguished.

"Indian country, under the Act of June 30, 1834, and as amended in 1864, remains such so long as the Indians retain their original title to the soil and ceases to be Indian country whenever they lose title in the absence of any different provision by treaty or Act of Congress."

Bates vs. Clark 95 U. S. 204, 209. 24 T. ed. 471, 473.
United States vs. Celestine, 215 U. S. 285, L. ed. 197.

In the Celestine case the court also held, "But the word 'reservation' has a different meaning, for while the body of land described in the section quoted as 'Indian country' was a reservation, yet a reservation is not necessarily 'Indian country.' The word is used in the land law to describe any body of land large or small, which Congress has reserved from sale for any purpose. It may be a military reservation or an Indian reservation, or, indeed, one for any purpose for which Congress has authority to provide."

Furthermore there is no treaty with any tribe of Indians as to the jurisdiction over the land involved in this case. Neither is there any treaty or Act of Congress defining it to be or giving it the character of Indian country. From 1850 to 1891 this land belonged to the United States and was open to entry and sale. This extension was created by executive order dated October 16th, 1891, which executive order is as follows:

"Executive Mansion, October 16th, 1891. It is hereby ordered that the limits of the Hoopa Valley Reservation

in the State of California, a reservation duly set apart for Indian purposes, as one of the Indian reservations authorized to be set apart, in said State, by Act of Congress approved April 18th, 1864, (13 Stats., 39) be and the same is hereby extended so as to include a tract of country one mile in width on each side of the Klamath river, and extending from the present limits of the said Hoopa Valley reservation to the Pacific Ocean; *Provided, however,* that any tract or tracts included within the above described boundaries to which valid rights have attached under the laws of the United States are hereby excluded from the reservation as hereby extended.

"Benj Harrison, President."

The Hoopa Valley Reservation was established by executive order of President Grant dated June 23, 1876, made under authority of Act of Congress of April 8th, 1864. Section 2 of said Act provides as follows:

"Sec. 2. And be it further enacted, That there shall be set apart by the President, and at his discretion, not exceeding four tracts of land, within the limits of said State, to be retained by the United States for the purpose of Indian Reservations, which shall be of suitable extent for the accommodation of the Indians of said State, and shall be located as remote from white settlements as may be found practicable, having due regard for their adaptation to the purposes for which they are intended; Provided, That at least one of said tracts shall be located in what has heretofore been known as the northern district; and Provided, further, That if it shall be found impracticable to establish the reservations herein contemplated without embracing improvements made within their limits by white persons lawfully there, the Secretary of the Interior is hereby authorized and empowered to contract for the purchase of such improvements, at a price not to exceed the fair valuation thereof, to be made under his direction. But no such contract shall be valid, nor any money paid thereon, until, upon a report of said contract and of said valuation to Congress, the same shall be approved and the money appropriated by law for that purpose; and Provided, further, that said tracts to be set apart as aforesaid

may, or may not, as in the discretion of the President may be deemed for the best interests of the Indians to be provided for, include any of the Indian Reservations heretofore set apart in said state, and that in case any such reservation is so included, the same may be enlarged to such an extent as in the opinion of the President may be necessary, in order to its complete adaptation to the purposes for which it is intended."

It will be readily seen from the Act of 1864 and these executive orders that the United States simply set apart for the purposes of an Indian reservation land to which it already had and claimed title. It could just as well have set it apart for some other purpose. The rights of settlers within the original Hoopa Valley Reservation had to be purchased by the government and all land within the boundaries of the extension to which valid rights had attached was expressly left out and not included within the limits of said extension. The act of March 3, 1865, 13 Stats., L. 538, appropriated money to purchase the improvements of white settlers on this land.

Furthermore if an Indian Reservation within a State is Indian country, the federal courts would have had jurisdiction in the Draper and McBratney cases, under the Act of June 30, 1834, and as amended in 1864 (Sec. 2145 R. S.) and under the ruling in Westmoreland vs. United States, 155 U. S. 547, 39 L. ed. 255, 256. Westmoreland was a white man, and was accused of the murder of one Green a white man in the Indian country. It was held that the court had jurisdiction. The only way in which the Draper and McBratney cases can be reconciled with the Westmoreland case is that an Indian reservation within the boundaries of a state is not Indian country. In McBratney vs. United States, the court held "The State of Colorado, by its admission into the Union

by Congress, upon an equal footing with the original States in all respects whatever, without any such exception as had been made in the treaty with the Ute Indians and in the Act establishing a territorial government, has acquired criminal jurisdiction over its own citizens and other white persons throughout the whole territory within the limits, including the Ute Reservation, and that reservation is no longer within the sole and exclusive jurisdiction of the United States. The courts of the United States have, therefore, no jurisdiction to punish crimes within the reservation, unless so far as may be necessary to carry out such provisions of the Treaty with the Ute Indians as remain in force." These rulings also establish, then, that an Indian reservation is neither a place within the sole and exclusive jurisdiction of the United States nor Indian country.

In the United States vs. Kagama, 118 U. S. 383, 30 L. ed. 231, it was contended by Plaintiff in error that the State and not the United States had the right to punish even an Indian for the crime of murder on a reservation within the limits of a state and that any Act of Congress attempting to provide otherwise was unconstitutional. While holding in this case that the Act of Congress of June 30, 1885, was constitutional, the court said, "It will be seen at once that the nature of the offense (murder) is one which in most all cases of its commission is punishable by the laws of the states, and within the jurisdiction of their courts. The distinction is claimed to be that the offense under the statute is committed by an Indian, that it is committed on a reservation set apart within the State for residence of the Tribe of Indians by the United States, and the fair inference is that the offending Indian shall belong to that or some other Tribe. It does not interfere with the process of the state courts within the

reservation, nor with the operation of state laws upon white people found there. Its effect is confined to the acts of an Indian of some tribe, of a criminal character, committed within the limits of the reservation."

The court in finding that the act in question did not interfere with the operation of state laws upon white people found there in effect held that the Hoopa reservation (the same reservation the extension of which is involved here) was not a place within the sole and exclusive jurisdiction of the United States. The act only applies to Indians a member of some Tribe, committing any of the crimes enumerated within the limits of an Indian reservation.

It is well to note here that the indictment in the Celestine case, 54 L. ed. 195, the pleader took care to allege that the accused Celestine was an Indian, recognizing the necessity of such an allegation. But even more significant is the assumption on the part of the court that Celestine was not a citizen under the 1st section of the 14th amendment to the Constitution, 54 L. ed. 199. If it had been shown that he was such citizen it would not have been held that the circuit court for the Western District of Washington had jurisdiction of the case. That Celestine was an Indian was absolutely essential to establish the jurisdiction of the United States court. The evidence shows plaintiff in error to be a citizen under the 14th Amendment of the Constitution, it being shown that his father was a white man and a citizen of the United States, that he was educated in schools off the reservation, that he was a voter and lived and was reared on land owned by his father before his death, that he was born on the coast off of and away from the reservation. (Trans. pages 29, 30, 36 and 37.) There is not an iota of evidence to show plaintiff to be a tribal Indian.

That it is essential to allege in the indictment and prove on the trial that the accused is an Indian is decided in United States vs. Hadley, 99 Fed., 437, the Court holding, "The indictment charges that the defendant is an Indian and this allegation is necessary and material to bring the case within the purview of the statute, and therefore essential to the jurisdiction of the court." In the later case of United States vs. Logan, 105 Fed. 240, the Court reaffirmed the rule in the following language, "The demurrer must be sustained because of the failure of the pleader to allege that the defendant is an Indian. The omission is fatal." The supreme court of Minnesota in the case of State vs. Campbell, 53 Minn., 354, has also held the same.

It must also be borne in mind that the United States never reserved any jurisdiction over the land included within the Hoopa Reservation either in the Act admitting California into the Union or in any other act. Neither did the State of California at any time cede to the United States any jurisdiction over such land or disclaim in any manner jurisdiction over the same. There never was any treaty or other compact entered into between the United States or any band or tribe of Indians in reference to such land. The State of California had absolute criminal jurisdiction over this land for 41 years, and even if an Indian had killed another Indian on the land mentioned in the indictment on October 15th, 1891, or any time prior thereto, the state and not the federal courts would have had jurisdiction.

Plaintiff in error also contends the executive order of President Harrison issued October 16, 1891, creating the extension to the Hoopa Valley Reservation, and quoted above, is void. This executive order as it states is based on the provisions of the Act of 1864 giving the president

authority to set apart four tracts of land within the State of California for purposes of Indian reservations. This act of 1864, however, gives no authority for extending or enlarging the limits of any reservation created under the provisions of said Act. The only authority given for extending or enlarging a reservation is contained in the last clause of Section 3 of the Act quoted above and which clause is as follows:

"And provided further, that said tracts to be set apart as aforesaid may, or may not, as in the discretion of the President may be deemed for the best interests of the Indians to be provided for, include any of the Indian reservations heretofore set apart in said state, and that in case any such reservation is so included, the same may be enlarged to such an extent as in the opinion of the President may be necessary, in order to complete its adaptation to the purposes for which it is intended."

The enlargement provided for in said clause refers to reservations created before the passage of the Act and does not apply to reservations created or established by the Act itself. The language is too plain to admit of any other construction. The Hoopa Valley Reservation as already stated was definitely established by executive order of June 23rd, 1876, and originally comprised 89,572 acres. It formed no part of nor included any reservation created prior to April 8th, 1864. The executive order, then, of October 16, 1891, is void as not being authorized by any act of Congress. There is now no legal extension to the Hoopa Valley Reservation and there can be none until there is an Act of Congress authorizing it.

A very interesting question concerning the place of the alleged crime now arises. Conceding only for the sake of argument that the extension of the reservation involved here-

in was lawfully created, plaintiff in error insists *that the evidence shows the alleged crime was committed on the Klamath River which is outside the limits of the extension.* In the first place the executive order of October 16, 1891, described the land set apart to be "a tract of land one mile in width on each side of the Klamath River." These words exclude the river. But even if the order attempted to include the river it would have been void to that extent, for the reason that the State of California was admitted into the Union upon the condition that the navigable rivers should be public highways as to the citizens of all states. 9 Stats. L. 453.

"Upon the admission into the Union this State became vested with all the rights, sovereignty and jurisdiction in and over navigable waters, and the soils under them, which were possessed by the original states after the adoption of the constitution of the United States - - - - The navigable waters and the soils under them were not granted to the United States by any of the original states but were reserved to the states respectively; and the new states have the same rights, sovereignty and jurisdiction over this subject as the original states."

Lux vs. Haggin, 69 Cal., 335.

The Klamath river has its source in Klamath Lake in south central Oregon and flows across north-western California into the Pacific Ocean. The executive order creating the extension not only provides that it shall be one mile in width on each side of the Klamath River, but also that it shall extend "from the present limits of the Hoopa Valley Reservation to the Pacific Ocean." The Hoopa Valley Reservation is on the Trinity River, and if this extension as described includes the Klamath River, it would cover the Klamath River from its junction with the Trinity to its mouth. Now the alleged crime occurred in front of an Indian village

on the Klamath River just below what was called Johnson's, at which place there was a store. (Page 13 trans.) From Requa, near the mouth of the river, to Johnson's store is a distance of 25 miles. Paul Smith, a witness called by the government testified; "Steamboats and gasoline engines at certain times go up the Klamath River about 28 miles. At certain times in the summer they cannot go above six miles." (Page 39 Trans.) James Matsen, also called for the government gave the following: "The freight coming up the river for Johnson's store from Requa landed above where Chickasaw was shot. Page 13 Trans. Henry Griffin, sworn for the government, referring to a particular time he went down the river, said, "I was going to Requa with Mr. Stevens in a boat after freight." (Page 16 Trans.) Charles Stevens, sworn for defendant, said, "I have been engaged a long time in the sheep business with my father, a white man. Am acquainted with the Klamath River from its mouth to Johnson's store, and have freighted wool down the Klamath River." (Page 28 Trans.) The foregoing amply establishes the Klamath River to be a navigable stream and the evidence shows in addition that the alleged crime occurred at a point on the river where it was actually used for the purposes of commerce.

Then again the court will take judicial notice that the tide ebbs and flows on the Klamath near its mouth. In United States vs. La Vengeance, 3 Dall. 297, the court took judicial notice of the geographical position of Sandy Hook. In the case of The Apollon, 9 Wheat, 374, the Court held that it was bound to take judicial notice of public facts and geographical positions; and Peyroux vs. Howard, 7 Pet. 341, that it would take judicial notice of the position of the City of New Orleans, and whether the tide ebbed and flowed there.

"In fine, courts will generally take notice of whatever ought to be generally known within the limits of their jurisdiction." (1 Greene Ev. Sec. 6.) As the Klamath River flows into the Pacific Ocean, the court will take judicial notice that it is a tidal river at least near its mouth.

This river in view of its length and size belongs to the State of California, for the use of the citizens of all the States. It is the third river of the State of California in size and is described in the American Encyclopedia, Vol X, p. 22, as follows:

"It rises in Lower Klamath Lake in S. part of Oregon, and flows W. and S. across the California frontier. Its course W. S. W. and afterwards S. W., until it is joined by the Trinity river on its left bank when it makes a sharp bend and flows N. N. W. to the Pacific about lat. 41 degrees 30 min, N. There is a bar at its mouth which can be crossed at high water by ships of the line, and at low water by small boats only. The river itself is navigable by small steamers for about 40 m. Its waters abound in salmon and other fish, and there are valuable gold diggings on its banks. Its length is about 250 m."

Klamath Lake, of which it is the outlet, is about 44 miles in length by 6 to 14 miles in width, and this lake and river at Klamath Falls, Oregon, is the scene of erection of costly and expensive irrigation works on the part of the government.

There can be no question, then, that President Harrison recognizing then the sovereignty of the states over navigable waters purposely excluded the Klamath river from the limits of the reservation he attempted to create by his executive order of October 16, 1891. It hardly seems reasonable that the President would have intentionally tried to include the Klamath River within the limits of a reservation from the

Hoopa Valley Reservation to the Pacific Ocean, a distance of 50 miles. If the river is included this would be the effect of the order. But the order means what it says and that is that the extension shall include land on each side of the river. This does not take in the river, simply the land next to it. And if the language could be construed so that the river would be included it would avail nothing because the Klamath at the place of the alleged crime is a public highway.

The next question that arises is "Was the alleged crime committed on the Klamath river?" This question should be answered in the affirmative. James Masten, the government's witness, already mentioned, testified he had heard a shot about 7 or 8 in the morning, and about an hour or so afterward Sullivan came and said "Chickasaw is killed down there on the river." The witness then testified: "I went down on the river bar and saw Chickasaw lying on the top of the bank, wrapped in a blanket, dead - - After seeing Chickasaw lying on the bar dead, I went *forty or fifty yards further up the bank* and saw the mark of the knee in the sand in the willows. I tracked from the mark of the knee from there down - - - There were man's tracks and I followed them three hundred yards. The track led pretty near to the end of the bar - - - By the end of the bar I mean river bar - - - Chickasaw was about 10 or 15 feet from the edge of the water when I saw him, really within a few feet of the Klamath River. Pages 12, 13, Trans.)" On cross examination, the same witness testified:

"When the water is high it comes up to the high bank and covers the bar, and if the water was high you could not see the clump of willows. The clump of willows was about 40 yards from where Chickasaw was lying, 10 or 12 feet from the river - - *The body was carried from the river up to*

where I saw it lying 10 or 12 feet from the river - - - In the afternoon I saw blood right at the edge of the water and also between where Chickasaw was lying and the edge of the water. I think he must have run up away; you could see the blood. The blood did not extend all the way from the water's edge to where I saw Chickasaw that morning." (Page 13 Trans.) Seeley Griffin, also sworn for the government, testified on cross-examination, "At the time I saw Chickasaw the body was not very far from the edge of the river; somewhere on the top of the bank and the slope of the river." (Page 14 Trans.) Albert Nixon, sworn for the government, testified: "I heard a shot and just lifted up my head to the river and saw a bullet twice skip along the water - - - I heard a shot and saw the white foam along the middle of the river. I and Jimmy Masten went down together where we saw Chickasaw lying on the bank. He was naked. He was bleeding at the throat." (Page 21 Trans.) It was the theory of the government at the trial as before stated that Chickasaw was shot while in bathing and that his slayer occupied the clump of willows on the sand or gravel bar when he fired the fatal shot.

Now this clump of willows was 40 or 50 yards further up the bank than where Chickasaw was laid when he was first taken from the river after being shot. The willows grew on the river bar which was covered at high water, as was also the willows. According to the proof introduced by the government, the deceased was shot in the river and his slayer at the time of committing the act occupied a position on the river bar above his victim.

The alleged crime took place below ordinary high water. A river is composed of its banks, bed, and water. The banks of a river are just as much a part of the river and are as necessary to the existence of the river as the water itself. This is clearly established in the case of Ventura Land, etc., Co. vs. Meiners, 136 Cal., 290, 291, in which case the court held:

"According to the most approved definitions, the banks of rivers or other watercourses are 'those boundaries . . . which contain their water at their highest flow'; or, as otherwise expressed by the same judge, they are 'the fast land which confines the river in its channel or bed, in its whole width,' i. e. as determined by its highest flow. (Howard vs. Ingersoll, 13 How. 415, 417.) This accords with the definition given in Stone vs. August, 46 Me. 137, to-wit: 'By this term is understood what contains the river in its natural channel when there is the greatest flow of water'; and also the definition in the digest, cited Angell on Water Courses (Sec. 24, note 3), viz: 'That is considered the bank which contains the river when fullest.' This definition seems to have been generally accepted. (McKinney on Irrigation, Sec. 39, note 43; Gould on Waters, Sections 41, 45, and notes; Long on Irrigation, Sec. 32; Angell on Watercourses, Sections 4, 24, and notes, cited supra; Palmer vs. Waddell, 22 Kan. 355, and Earl v. De Hart, 12 N. J. Eq. 280, there cited; Sparks Mfg. Company vs. Town of Newton, 57 N. J. Eq. 383, 384."

It requires bed, shores and banks, as well as water, to constitute a river. (Ravenwood v. Fleming, 22 W. Va., 52.)

The title to lands under navigable waters in the State, including the shore or space between high and low water marks, is held by the state in trust for the use of the inhabitants, such title being essential to the sovereignty of the State, to the proper exercise of the police power, and to the welfare of the people of the State.

State ex. rel. Ellis v. Gerbing, 22 L. R. A. (N. S.) 337.

The foregoing clearly establishes that the alleged crime was committed on the Klamath River, as this river extends to high water mark on each shore. It includes its banks between low and high water mark. The river then commences at high water mark and the reservation ends at the same mark. Both the deceased and the alleged slayer were out-

side the limits of said reservation. Not only was the deceased below high water mark, when he was shot, but he was, according to the theory of the government, below low water mark. The alleged crime was therefore not committed within the limits of the extension of the Hoopa Valley Reservation as alleged in the indictment, but on the Klamath River outside of said extension.

There is another reason why the place of the alleged crime is outside of the reservation.

The executive order of October 16, 1891, not only excluded the Klamath River, but also provided "That any tract or tracts included in the above described boundaries to which valid rights have attached under the laws of the United States are hereby excluded from the reservation as hereby extended."

At the trial plaintiff in error showed that on October 20, 1888, nearly three years before the creation of the extension of the reservation, a mining location was filed on lots 8 and 9 of Section 7, Township 11 North, Range 3 East, Humboldt Meridian. Wahtek village, the home of Chickasaw, is in said lot 8 and the southern boundary of lots 8 and 9 is the Klamath River. (Page 37, Trans.) This location is set out in full on page 38 of the Transcript and is as follows, to-wit:

"Notice is hereby given that the undersigned, having complied with the requirements of Cmapter A. of Title 32, of the Revised Statutes of the United States, and the local customs, laws, and regulations, have located 20 acres each of placer mining ground, situated in the county of Humboldt and State of California, and described as follows:

"The northwest quarter of the northwest quarter of section 17; the north half of the northeast quarter of the northeast quarter of section 18; the south half of the southeast quarter of section 7; and the south half of the southwest

quarter of the southwest quarter of section 8; all in township 11 north of range 3 east of Humboldt meridian.

"This claim shall be known as the 'Klamath Bluffs Hydraulic Gold Mining Claim.'

"Dated October 9, 1888.

J. E. STUART.
J. M. WHITE.
M. MILLER.
D. M. SHORT.
J. W. ELLYSON.
W. H. ROBINSON.
C. G. ROBINSON.
F. ROBINSON.

Witness:

W. M. CLEVELAND.
W. L. LEWIS.

"Recorded at the request of W. F. Shelton, Oct. 20, 1888, at 5 min. past 9 a. m.

"Geo. A. Kellogg, Recorder."

Mrs. Goodwin, sworn for plaintiff in error stated that she was acquainted with a mine in the vicinity of Johnson or Wahtec. (Page 37 Trans.) The fact is valid rights to this river bar for mining purposes attached before the extension was ordered. The government in no way attempted to dispute the legal location of this land for mining purposes. So if it could be contended that the river bar was not part of the river (which we do not admit) still it does not come within the limits of this extension being land to which valid rights have attached and coming within the class expressly mentioned in the last clause of said executive order of October 16, 1891.

Attention is also called here that prior to 1891 Humboldt County had already created a public school district which included the premises involved herein and before and since maintained a public school on the land just west of this village and Johnson's. (Page 13, 38) This shows that the

state and county had assumed jurisdiction over the land on each side of the Klamath River for school purposes before there was any enlargement of the Hoopa Valley Reservation and that it still exercises the right to maintain a school there.

ERROR IN INSTRUCTING THE JURY.

Regarding the giving and refusing of instructions the error in giving the following, "and that any murder committed by an Indian upon or by a white man upon an Indian, or by a man of mixed Indian and white blood upon an Indian within the limits of said reservation or its extension, is within the criminal jurisdiction of this court" (Page 45 Trans.) consists in charging that a murder committed by a white person or a person of mixed blood within the limits of said reservation was within criminal jurisdiction of this court. That only a tribal Indian can be held responsible for a murder so committed has been amply shown in our argument above concerning the failure to allege in the indictment that plaintiff in error was an Indian.

Plaintiff in error also requested the Court to give the following instructions:

"You are instructed that the Klamath River is not within the limits of said extension, and if the alleged crime described in the indictment was committed on said river, then the evidence has failed to establish the jurisdiction of this court to try this defendant, and your verdict, under such circumstances, should be not guilty."

"You are instructed that if you believe a crime was committed, but you also believe that it was committed between high and low water mark on the Klamath River, then you can not find the defendant guilty in this case, because, under such circumstances, this court would have no jurisdiction of

such an offense committed within such limits or in such a place."

The two foregoing instructions cover the theory of the plaintiff in error as to the law governing the place of the alleged crime as shown by the evidence. They are instructions which cover the law as applied to the facts of the case at bar concerning the place of the alleged crime.

These two instructions were not covered by any other instructions given by the Court. (Pages 43, 44, 45, 46, 47, 48, 49 and 50, Trans.) They go to the jurisdiction of the Court as to the place of the alleged crime, and should have been given as well as the following instruction:

"You are instructed that the burden is on the government to show that the defendant committed the offense within the limits of said extension, and even if you believe the defendant did commit the offense, yet if you are not satisfied beyond a reasonable doubt and to a moral certainty that the offense was committed within the limits of said extension, then you must find the defendant not guilty."

The law involved in these instructions has been amply explained in the argument above relating to whether or not the Klamath River is within the extension and as to what constitutes a river. There is evidence to support the claim of plaintiff in error that the offense was committed on the Klamath River outside of the limits of said extension and plaintiff in error was entitled to have said instructions read to the jury so long as these instructions were not covered by any others given by the court.

Errors relating to jurisdiction were therefore carried out in the indictment, in the proof and in the instructions of the Court.

ERROR IN EXCLUDING THE CONFESSION OF JOE DICK.

It was the theory of the plaintiff in error that the deceased was murdered by one Joe Dick, a deceased Indian. At the time of the alleged homicide Joe Dick had an acorn camp on the top of the hill two miles from Johnson's and to go there from Johnson's a northwest course is first taken. (Page 28 Trans.) The river near Johnson's runs in a northwesterly direction (Page 37 Trans.). A natural course to take to get to Dick's camp from the clump of willows on the bar already spoken of, would be to go down the bar then go up the hill west of the Griffin house. Dick's permanent home was about 50 yards from Chickasaw's and he would naturally be well acquainted with Chickasaw's habits. (Page 32 Trans.) Dick was also a consumptive (Page 32, 35, 37, Trans.). There was one place on the bar under some willows and quite a distance from where the tracks started that indicated that the person making the tracks had sat down. (Page 27 Trans.) This, plaintiff in error claims, shows shortness of breath, which a consumptive would naturally be afflicted with. Having introduced evidence showing these facts, plaintiff in error then called William Norris, trustee of the Riverside School District in Del Norte County, and he having been sworn answered some preliminary questions and then the following took place:

"Q. What can you state as to the state of his health along about 1901 and 1902?

"The Court. I cannot see the materiality of that unless you can state it.

"A. His health was poor.

"The Court. Do not answer.

"Mr. Quinn. Q. Do you know what his health was?

The Court. Strike that out until we hear the materiality of his health is.

"Mr. Quinn. The purpose of it, may it please the Court, is in reference to the person that sat down after he had proceeded from where this imprint was down on the river; that he sat down; and the purpose of it is to connect that with a further statement made to this witness at Requa in reference to the fact that this Joe Dick, this consumptive, confessed to this witness that he was the person that shot Chickasaw; that he was up at a place where they were picking stuff above the Sebastian ranch.

"The Court. You mean you propose to introduce by a witness a statement to him by somebody that is not on trial here.

"Mr. Quinn. A confession by another person.

"The Court. No; that would not be admissible; you see, that is purely hearsay.

"Mr. Black. I object to it as immaterial, irrelevant and incompetent for any purpose here.

"Mr. Quinn. I desire to take an exception to the ruling of the Court.

"Mr. Quinn. In order to save my rights in the matter, I desire to ask the witness the further question and get the ruling.

"Mr. Quinn. Q. Did he make any statement to you in reference to who it was that shot this Indian, Chickasaw, and what they got for shooting this Indian?

"Mr. Black. To that we object, unless it indicates the defendant, on the ground that it is immaterial, irrelevant and incompetent.

"The Court. You propose by that to implicate this defendant.

"Mr. Quinn. I do not. This is with reference to the third party, to the party speaking, Joe Dick.

"The Court. In other words, in line with what you stated a moment ago?

"Mr. Quinn. Yes.

"The Court. The objection will be sustained.

"Mr. Quinn. Exception."

(See pages 35 and 36 Transcript.)

Our position as to the admissibility of the offered testimony is best expressed by Professor Wigmore of the Northwestern University in his late work on evidence. Professor

Wigmore ruthlessly attacks the principle that would accept declarations against a pecuniary or a proprietory interest, but not a penal interest. He gives the history of the growth of arbitrary limitations in Section 1476, Volume II of the treatise and in the next section, Section 1477, shows the positive injustice of prohibiting the confession of a person, deceased or otherwise, unavailable as witness, of a crime for which another person is being tried. Section 1477 is as follows:

"It is plain enough that this limitation, besides being a fairly modern novelty, is inconsistent with the broad language originally employed in stating the reason and principle of the present exception (ante, Sec. 1475, 1476), as well as with the settled principle upon which confessions are received (ante, Section 1475). But, furthermore, it cannot be justified on the grounds of policy. No plausible reason of policy has ever been advanced for such a limitation. Furthermore, the practical consequence of this unreasoning limitation are shocking to the sense of justice; for, in its commonest application, it requires, in a criminal trial, the rejection of a confession, however well authenticated, of a person deceased, or insane, or fled from the jurisdiction (and therefore quite unavailable) who has avowed himself to be the true culprit. The absurdity and wrong of rejecting indiscriminately all such evidence is patent.

"The rulings already in our books cannot be thought to involve a settled and universal acceptance of this limitation. In the first place, in almost all of the rulings the declarant was not shown to be deceased or otherwise unavailable as a witness, and therefore the declaration would have been inadmissible in any view of the present exception (ante, 1456). Secondly, in some of the rulings (for example, in North Carolina) the independent doctrine (ante, Secs. 139-141) was applicable that, in order to prove the accused's non-commission of the offense by showing commission by another person not merely one casual piece of evidence suffices but a prima facie case resting on several concurring pieces of evidence must be made out. Finally, most of the early rulings had in view, not the present exception to the

Hearsay rule, but the doctrine of Admissions (ante, 1076, 1079) that the admissions of one who is not a co-conspirator cannot affect others jointly charged. It is therefore not too late to retrace our steps, and to discard this barbarous doctrine, which would refuse to let an innocent accused vindicate himself even by producing to the tribunal a perfectly authenticated written confession, made on the very gallows, by the culprit now beyond the reach of justice. Those who watched with self righteous indignation the course of proceedings in Captain Dreyfus' trial should remember that, if that trial had occurred in our own Courts, the spectacle would have been no less shameful if we, following our own supposed precedents, had refused to admit what the French Court never for a moment hesitated to admit—the authenticated confession of the escaped Major Esterhazy, avowing himself the guilty author of the treason there charged."

Plaintiff in error showed at the trial that Joe Dick was dead, thereby accounting for his not being called as a witness. In nearly all the cases cited under Section 1476 of Wigmore's treatise the declarant was not accounted for and the learned professor lays special stress on this lack of accountability in these cases which declared the admissions inadmissible. But in the case at bar, the absence of the declarant has been accounted for. Not only this, but facts showing: Where he lived and thereby necessarily knowing the habits of Chickasaw; where he had his acorn camp at the time; the tracks on the bar and where they left the bar, making it more convenient to go to his camp than to the home of plaintiff in error at Pecwan; the impression where he sat down, indicating shortness of breath, which he was necessarily afflicted with, being a consumptive. It is therefore respectfully contended that the rigors of the rule which would admit declarations against pecuniary and proprietary interests but not against penal interest should be changed by admitting declarations against penal interest when the proper foundation has been laid as well as those against property in-

terests. Such evidence would only be entitled to that weight which it should deserve under all the circumstances of the particular case and could be given to the jury safeguarded by proper instructions as to such weight. But its admission would be just and reasonable and would harmonize with modern ideas, thought and progress.

ERROR IN DENYING MOTION FOR A NEW TRIAL AND IN ARREST OF JUDGMENT.

The next point that will be noticed is the error of the Circuit Court in denying the motion for a new trial on the ground of newly discovered evidence.

The principal witness on the part of the government against the plaintiff in error was Henry Griffin whose evidence is found on pages 14, 15, 17, 18 and 19 of Transcript. This witness lived down the river from where Chickasaw was killed on deeded land belonging to the witness James Masten mentioned above. Griffin claimed to have seen plaintiff in error on the morning of the death of Chickasaw coming up a road or cow trail that led from the river, where the tracks left the bar. He claimed to have also assisted in following the tracks down the river to where they left the bar. Though he assisted in trying to locate the supposed slayer, he never mentioned what he claims to have seen to his brother who was with him that morning or to those who accompanied him in following the track. He gave as his reasons that he was afraid of Donnelly. His evidence on these facts is as follows:

"I was there the day Chickasaw was killed. That morning I first heard a shot. It was about seven o'clock; I was outside, going to look for my cows. After the shot I heard a

holler. I then went about forty yards from the house looking for my cow; there was a little spring about twenty yards from the house and bushes down on the hillside on a trail. When I got there I looked down and saw some one coming up. I kind of stooped down. I wanted to look who it was. When I looked up I see it was Jim Donnelly coming up. I hid kind of behind a bush. I stepped behind a bush. When he was coming up the road he was looking around, and he struck down a road kind of down this way. It reached down this way; the road around this way, that is a little trail. When he reached the road he started to run down; he ran around that point, about fifteen yards, as far as I could see. He had a gun with him. I did not speak to him and I would not show myself when I see a man come up in that way on a cow trail and not a regular trail. I went back to the house right away and we had breakfast." (Page 14, 15, Trans.)

"I started from the willow bush and followed the track in the sand as far as the cow trail that I saw Jim Donnelly coming up that morning. The first person I told that I saw Donnelly was Chapman, who kept the store on the Klamath."

"When I told Chapman I guesss was in the fall, and I left there next July and I stayed at Arcata, Camp Nine, all that time. I did not tell what I saw that morning long before this because that is not right; if I tell anybody I might get into trouble myself. I was afraid to tell because he might get after me if I tell anybody."

Cross-examination:

"I went down the river about forty yards from the house and I hid behind the bush, and I guess I was fifteen or twenty yards from where I saw the man coming up the trail. He walked up the hill. I did not speak to him because I was afraid of Jim Donnelly myself, as he pretty near shot me once with a shot gun."

"And I did not tell him about seeing Jim Donnelly in the morning. We tracked in the forenoon. Jimmie Masten was the first to track, and there was a whole lot of fellows who tracked. I went clear down to the end of the bar, to the end of the orchard fence. When we went to follow those tracks we were all trying to find out who shot Chickasaw. It was not our business. We did not care much to find out, because it was not our business. I took the trouble to go down there

and follow those tracks and never told anybody what I had seen that morning. Though assisting in tracking I would not tell nobody.

After the government closed its case and the defense had made its opening statement, the government asked to re-open its case and this same witness was recalled (Page 9, 17, Trans.). On being recalled he testified:

"When I followed the tracks along the sand bar, one of the tracks showed that the shoe was patched. This showed clear along the bar. I saw Jim Donnelly in front of Jim Masten's store about eleven o'clock the same morning that Chickasaw was killed. There was a whole lot of fellows there, and Jim Masten, talking about wanting to find out who killed Chickasaw. I was talking there, and seen this old woman, Jim Donnelly's mother-in-law, and see Jim and his wife. This old woman said to me a fellow got killed down there. Jim Donnelly's wife steps down, going down that way. Jim was standing there a while, and afterwards he came along and he stopped in front of the store of Jim Masten, and the sled was remaining this way. There was a door here, and I sat on the edge of the sled, and Jim Donnelly sat on the end. I on that side and he on this side, and got his feet this way (illustrating). Some one was talking. I said 'Oh, there is the man that got a patch on his shoe,' and he put his feet down, got up, and went down to old Dick's house. He came right back, but never stopped; went right along. When he sat with his legs crossed, I see a patch on the sole of his shoe. That was the same patch that the patch was on the sole that we saw on the tracks. All Jim said was 'Oh' and put his feet down."

Cross-examination:

"Mr. Quinn. You were anxious to find out who it was that did the shooting? You were all together trying to find out who did it?

"A. Yes, sir; all talking there, a whole lot of fellows; I don't remember how many of them.

"Q. You did not tell anybody while you were talking

about this patch that you had seen Jim Donnelly before that morning down below your house.

"A. No; I would not tell anybody.

"Q. If you could not tell anybody that, why did you tell Jim Donnelly 'Here is the man with the patch,' in front of the crowd?

"A. Because I see he had the patch. I says, 'here is the man who has the patch on his shoe.'

Q. You knew the person whom you thought did the shooting had a patch on his shoe; you had seen Jim Donnelly down there before that, but would not say that, but you would not say that, but you would about the patch?

"A. I would not tell my own brother; I am afraid myself. If I told that, he might have done the same thing and shot me somewhere, you see.

The foregoing story is flagrantly false on its face. This witness who from the time he followed the tracks until several years afterwards was afraid to mention he had seen Donnelly below his house on the morning of the death of Chickasaw. He was afraid that Donnelly might injure him if he told what he saw. But on the very same morning that he claims he saw Donnelly but was afraid to tell, he also claims he saw a patch on one of Donnelly's shoes and in front of the crowd said to Donnelly and the crowd, "Oh, there is the man that got a patch on his shoe." This man who was afraid to tell his own brother that he saw Donnelly that morning or anybody else for years afterwards, is publicly accusing Donnelly of the offense. The story of seeing Donnelly and being afraid to tell is so absolutely inconsistent with the story about the patch and accusing Donnelly as being the man with the patch, that no part of Griffin's story can be accepted.

If true, Griffin's testimony about seeing the patch on Donnelly's shoe would have been important for the government. But the government had closed its case without putting it in, and the story itself, and the time at which and the

manner in which it was introduced, taken in connection with Griffin's other testimony, makes it of a most doubtful character. If that story were true, why did not the government introduce it before it rested? It was simply an afterthought on the part of Donnelly's enemies to connect him more definitely with the alleged crime.

On the motion for a new trial plaintiff in error introduced the affidavit of one Henry George, which affidavit is as follows:

"On this 21 of February in the year 1910, before me George W. Hopper, a notary public for Del Norte County, California, personally appeared Henry George being duly sworn deposes and says that he came to where Chickasaw was killed between 9 and 10 o'clock in the morning that he was killed he went to the house where Chickasaw was laid out there were a lot of people there when i first heard it i was at Johnsons store i went to the house i went from there down to whare we started to follow the tracks there was James Mastin. Jimmy, Segon johnny. Doe Big. Fire. i went to the first creek and came back the others went on i did not see eny work of eny kind on the shoe print i heard Henry Griffin make the remark he wondered why he did not see the man as he ran by thare. Henry Griffin was with me went to the first creek and came back when i did when we were at the creek is when Griffin made the remark i wonder why i did not see the man as he went up the creek after Griffin made the remark we found the tracks turned down the creek and on the river then I and griffin went back to jimmy Mastins store and all the people there was wondering who could have killed Chickasaw when we got to Mastin's store James Donnelly was thare." (Page 52, Trans.)

This affidavit contains two important facts; one of which is that Griffin made the natural remark which he would have made if he had not seen the man in the vicinity of his house, which remark is: "I wonder why I did not see the man as he went up the creek." This shows that he didn't see Donnelly that morning, and the other fact is the track

didn't go up a road or cow trail, but turned down the creek again and went on down the river. The tracks never went up a road or cow trail by or west of Griffin's house, as he testified Donnelly went.

In view, therefore, of the character of Griffin's testimony, the chief witness for the government, there can be no question but this new and material testimony, discovered after the trial of this cause, would change the result. We now call attention to the facts that Henry Griffin, Ira Stevens, Albert Nixon, and James Minol, were all unfriendly to plaintiff in error. Griffin, who is an Indian, testified that, "I never speak to Jim Donnelly no more—I don't want to speak to you (Donnelly)" (Trans. Page 16). He and plaintiff in error had trouble and were not friendly at all. It was the same with Ira Stevens who did not like Donnelly or his family, and who on three different fights defeated Donnelly. (Page 19 Trans.) James Minol also testified: "I am not friendly with Jimmy Donnelly at all." Donnelly's sister had written to the sheriff to have him arrested. (Page 20, Trans.) Albert Nixon: "I am not friendly with Jimmie Donnelly and I don't like Jimmie Donnelly." Ira Stevens is a half breed, and Griffin, Minol and Nixon are Indians. The evidence given by Minol, Nixon and Stevens consisted of alleged statements of plaintiff rather indefinite in character. Plaintiff in error testified that Ira Stevens used to sell liquor to Indians and that James Masten ran a gambling house and sold liquor to Indians, all of which was never denied (Page 32 Trans.). This shows the disreputable character of the government's witnesses. Minol in his testimony first denied that he had heard Donnelly make any statement, but admitted he told the District Attorney the day before he had heard Donnelly make a statement. The person to whom the alleged state-

ment was supposed to be made, was one Hansen, a nephew of Chickasaw's and he still lived on the Klamath, but the government failed to call him as a witness.

Another significant fact concerning the improbability of plaintiff in error having exposed a patch on his shoe while sitting on a sled in front of Griffin, is this: The road down which Donnelly walked that morning was dusty, and where he was sitting was dusty. As Donnelly walked away from the sled the mark of the patch would show in the dust as well as in the sand, and a measurement could have been taken of the foot-prints in the damp sand and the foot-prints in the dust and on the road. It could have been easily shown on that very morning whether the foot prints in the sand and in the dust on the road were of the same size and bore the same peculiarities. Donnelly testified: "The road along there in front of Johnson's in places was dusty. It was so dusty you could distinguish foot-prints along the road way." (Page 31 Trans.) Then on rebuttal, the government put on two witnesses, a man married to an Indian woman, and the woman herself, who claimed to have seen plaintiff in error putting a patch on his shoe a day or two after the death of Chickasaw. It hardly looks reasonable that plaintiff in error, knowing that the person supposed to have shot Chickasaw wore a shoe with a patch on it, would go to the only public place in the vicinity of the alleged crime, to-wit, Johnson's store, and expose to the public the "patch" that was so much being sought after. This is preposterous.

The Court's attention has been called to the foregoing testimony for this reason: that the newly discovered evidence set out above would certainly be given weight by the jury in view of the inconsistencies and contradictions of the testimony introduced on the part of the government. The

weakness of the government's case is apparent. The new evidence is sufficiently strong and material to show that a different verdict would have resulted if it was introduced.

Rule 75 of said Circuit Court provides newly discovered evidence as a ground for a new trial. It is as follows:

"Newly discovered evidence material for the party making the application, which he could not with reasonable diligence have discovered and produced at the trial." (Page 56 Trans.)

The second affidavit introduced showing newly discovered evidence establishes positively that the body was found in the water. This affidavit by Charles Mack, is as follows:

"On this 21 of february 1910 before me George W. Hopper a notary public in and for del norte County personaly apeared Charles Mack being duly sworn and says that he was stopping with the old man Chickasaw on the day of his death that he was first found by a small boy about 10 years old and then told me and i was the next person to him the old man chickasaw had left the house about 20 minits before he was found dead by the boy the next person was a man by the name of soloman i asked him to help me lift him out of the water he first refused but in a few minits came and helped me move him upon dry ground the old lady chickasaw was crying and making a great deal of noise then lots of people came Henry Griffin was living about ½ mile from the place where Chickasaw was killed and knew nothing about it until he heard the old woman crying"

This goes to the jurisdiction of the Court, and a new trial should have been granted.

The question of the insufficiency of the evidence also goes to the jurisdiction of the Court, as it appeared that the alleged crime was committed on the Klamath River, and

there was no evidence to show plaintiff in error to be a *tribal Indian*. The bill of exceptions contains all the material testimony introduced at the trial (Page 43 Trans.) and the failure to establish jurisdiction clearly appears from the evidence introduced.

The evidence of plaintiff in error set out on pages 29, 30, 31, 32, 33, 34, 35, 37, 42 and 43 of Transcript accounts clearly for his whereabouts on the day of the alleged murder. Plaintiff in error contends that a case was manufactured against him by the principal witnesses called on the part of the government which their very testimony discloses. He cannot help, therefore, referring here to what the lower court said in pronouncing judgment against him which in substance was "that it would have been loth to have returned a verdict of guilty against plaintiff in error upon the evidence introduced at the trial of this cause."

A motion in arrest of judgment was made on the ground that the indictment failed to allege that plaintiff in error was an Indian. (Page 55 Trans.) The point involved having already been fully gone into in other connections, it is unnecessary to go into the law on this subject again.

Plaintiff in error, having presented the foregoing argument showing substantial error in the matter of jurisdiction, of giving and refusing instructions, of the admissibility of evidence, of denying motions for a new trial, and in the arrest of judgment, earnestly and respectfully contends that the judgment of said Circuit Court should be reversed.

Respectfully submitted,

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INDEX.

Page.

I. Federal jurisdiction exists over crimes by whites against Indians, in Indian country.
1. Conflicting authorities..... 2
2. Statutes conferring jurisdiction over Indian country.. 3
a. Not repealed by creation of States..... 5
(1) Cases reviewed..... 5
(2) History of legislation regulating intercourse with Indians..... 6
(3) Relation of Government to Indians..... 12
Prevents implied repeal of such laws..... 14, 16
(4) Creation of reservation imposes duty to protect Indians..... 15
(5) Statutes relating to Indians unrepealed by creation of State..... 16
b. Not repealed by sec. 9 of act of March 3, 1885.... 18
(1) History and purpose of act..... 19
II. An Indian reservation is Indian country..... 29
III. The Hoopa Valley Reservation extension was lawful.. 30
1. Extension and connecting link of two existing reservations..... 30
2. Created by order of the President, out of public lands.. 31
3. At least a reservation *de facto*..... 32
4. Ratification by Congress..... 33
IV. The *locus in quo* was not excluded from the reservation by the anterior location of an alleged valid mining claim..... 34
1. Point not before the court, for lack of proper objection and exception..... 34
2. Points invalid on the merits:
a. Mining claim did not cover *locus in quo*..... 36
b. No evidence that said claim was "valid" and "attached" when reservation was established..... 36
V. The *locus in quo* was not excluded from the reservation by the anterior creation of a State school district..... 37
1. Point not before the court, for lack of proper objection and exception..... 37
2. Point without merit—State school rights subordinate to Indian right of occupancy..... 38

67781—12——1

Page.

VI. Point that river bed was not within the reservation not properly raised in record and unsound on merits. 38
1. Defects in objections in trial court..... 38
2. Merits:
a. River declared nonnavigable by California statutes..... 39
b. California has surrendered criminal jurisdiction over the river..... 39
c. If navigability a question of fact, evidence did not justify instruction requested by defendant and denial proper..... 39
VII. Exclusion of hearsay testimony of alleged confession by person since deceased was proper..... 40
Maps..... Appendix.

LIST OF CASES CITED.

Allis *v.* U. S., 155 U. S., 117..... 35
Ball *v.* U. S., 147 Fed., 32..... 36
Beecher *v.* Weatherby, 95 U. S., 517..... 38
Belk *v.* Meagher, 104 U. S., 279..... 37
Black *v.* Elkhorn Mining Co., 163 U. S., 445..... 37
Blackbird, Re, 109 Fed., 139..... 28
Bogk *v.* Gassert, 149 U. S., 17..... 38
Braim *v.* U. S., 164 U. S., 221..... 35
Caldwell *v.* County of Sacramento, 79 Cal., 347..... 39
Columbia R. R. Co. *v.* Hawthorne, 144 U. S., 202..... 38
Connecticut Mutual Life Ins. Co. *v.* Union Trust Co., 112 U. S., 250.. 35
Crow Dog, Ex parte, 109 U. S., 556..... 21
Draper *v.* U. S., 164 U. S., 240..... 5
Edgington *v.* U. S., 164 U. S., 361..... 35
Fellows *v.* Blacksmith, 19 How., 366..... 32
Gibson *v.* Anderson, 131 Fed., 39, 41..... 32
Gillis *v.* Downey, 65 Fed., 483..... 37
Gon-Shay-ee, petitioner, 130 U. S., 343..... 28
Goodson *v.* U. S., 7 Okla., 117..... 28
Hallowell *v.* U. S., 221 U. S., 317..... 14, 17
Hart, Ex parte, 157 Fed., 130..... 28
Heckman *v.* U. S., 224 U. S., 413..... 13
Heff, Matter of, 197 U. S., 488..... 13
Hickory *v.* U. S., 151 U. S., 303..... 35
Hicks *v.* U. S., 150 U. S., 442..... 35
Holder *v.* U. S., 150 U. S., 91..... 35
Hunt, Ex parte, 157 Fed., 130..... 28
Jones *v.* Meehan, 175 U. S., 10..... 13
Kagama *v.* U. S., 118 U. S., 375..... 12, 21, 32
Leovy *v.* U. S., 177 U. S., 621..... 39
Mayfield, Ex parte, 141 U. S., 107..... 28
McKnight *v.* U. S., 130 Fed., 659..... 17

	Page.
M. K. & T. Ry. *v.* Roberts, 152 U. S., 114	37
Ops. Attys. Gen.:	
Vol. 14, p. 181	32
Vol. 17, p. 258	32
Vol. 26, p. 92	32
Vol. 28, p. 143	32
People *v.* Bristol, 23 Mich., 118	35
Perovich *v.* U. S., 205 U. S., 86	38
Rainbow *v.* Young, 161 Fed., 835	13, 15, 18
Richards *v.* U. S., 175 Fed., 91	36
Richardson *v.* U. S., 181 Fed., 1	36
Spalding *v.* Chandler, 160 U. S., 394	32, 37
Shelp *v.* U. S., 81 Fed., 694	36
Talton *v.* Mayes, 163 U. S., 376	28
Thiede *v.* Utah, 159 U. S., 510	35, 36
Union Insurance Co. *v.* Smith, 124 U. S., 405	36
Union Pacific Ry. Co. *v.* Daniels, 152 U. S., 684	38
U. S. *v.* Barnhart, 22 Fed., 285	2
U. S. *v.* Bridleman, 7 Fed., 898	2, 17, 30
U. S. *v.* Cardish, 145 Fed., 242	29
U. S. *v.* Crook, 179 Fed., 391	17
U. S. *v.* Ewing, 47 Fed., 809	3, 28
U. S. *v.* Grand Rapids & I. R. Co., 154 Fed., 131	32
U. S. *v.* Hadley, 99 Fed., 437	3
U. S. *v.* Hough, 103 U. S., 71	35, 36
U. S. *v.* Howard, 17 Fed., 638	17
U. S. *v.* Hunter, 21 Fed., 615	17
U. S. *v.* King, 81 Fed., 625	28
U. S. *v.* Leathers, 6 Sawyer, 17	30, 32
U. S. *v.* Logan, 105 Fed., 240	3
U. S. *v.* Loving, 34 Fed., 715	17
U. S. *v.* Martin, 14 Fed., 817	2, 30, 32
U. S. *v.* McBratney, 104 U. S., 621, 624	5
U. S. *v.* Mulholland, 50 Fed., 413; 149 U. S., 782	40
U. S. *v.* Mullin, 71 Fed., 682	17, 18
U. S. *v.* Payne, 8 Fed., 883, 887, 888	32
U. S. *v.* Payne, 22 Fed., 426	17
U. S. *v.* Rickert, 188 U. S., 432	13
U. S. *v.* Stocking, 87 Fed., 857	17
U. S. *v.* Sutton, 215 U. S., 291	13, 17
U. S. *v.* Thomas, 151 U. S., 577	29, 38
U. S. *v.* Ward, 42 Fed., 320	3
U. S. *v.* Whaley, 37 Fed., 145	28
Webb, Ex parte, 225 U. S., 696	14
Weems *v.* U. S., 217 U. S., 349	36
Wiborg *v.* U. S., 163 U. S., 632	36
Wilson, Re, 140 U. S., 575	19, 28, 29, 31
Worcester *v.* Georgia, 6 Pet., 515	7, 10, 15, 20, 32

In the Supreme Court of the United States.

OCTOBER TERM, 1912.

JAMES DONNELLY, PLAINTIFF IN ERROR,
v.
THE UNITED STATES.
} No. 97.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

Plaintiff in error was indicted, tried, and convicted for murdering an Indian within the limits of an Indian reservation in the State of California. The verdict rendered was "guilty of murder without capital punishment," and a sentence of life imprisonment was imposed. The case is here on a writ of error.

The jurisdiction of the trial court is attacked on two grounds:

(1) That even as to crimes within the "Indian country" the jurisdiction of the Federal courts is limited to those which are committed *by* Indians and does not extend to crimes by others *against* Indians.

(2) That the crime did not occur in "Indian country." Several grounds are advanced on this point, each of which we have discussed separately.

Error is also assigned to the refusal of the trial court to admit certain testimony.

First.

Crimes by whites against Indians within Indian country are crimes against the United States and subject to the jurisdiction of its courts.

The victim of the murder was concededly an Indian.

As to the defendant, the indictment did not charge that he was an Indian; the prosecution did not offer any proof that he was, and the court charged the jury in effect that it was immaterial. (R., Fol. 74.) Wherefore, though on the evidence of his own witnesses the fact may be thought doubtful, we feel obliged to assume for the purposes of the case and the question of the court's jurisdiction that defendant was not an Indian, and that if his being an Indian was essential to the jurisdiction, then the jurisdiction did not exist.

We proceed, therefore, to discuss the question whether the murder of an Indian by a white within Indian country and within a State falls under the jurisdiction of the Federal courts, or whether it is a matter for the courts of the State.

The lower courts have differed. The position of the court below is supported by—

> *U. S.* v. *Bridleman*, 7 F. R., 898 (D. C., D. Oreg., Deady, D. J.):
>
> Larceny of blanket by white from Indian on the Umatilla Reservation in the State of Oregon. Cf. also, *U. S.* v. *Martin*, 14 F. R., 817.
>
> *U. S.* v. *Barnhart*, 22 F. R., 285. (Same court.)

Murder by white of an Indian on the same reservation.

U. S. v. *Ewing*, 47 F. R., 809 (D. C. D. So. Dak., Shiras, J.).

Larceny by white from Indian on a reservation in the State of South Dakota.

Each of these three opinions is well and carefully considered.

In this connection see also the cases collected at the conclusion of the first branch of this point.

The position of the plaintiff in error is supported by—

U. S. v. *Logan*, 105 F. R. 240 (C. C.; D. Oreg.; Bellinger, D. J.). Defendant charged with assault on Indian with intent to kill.

Held fatal that the indictment did not charge that the defendant was an Indian.

There was substantially no discussion of the question.

and probably by the following, in which, however, it did not appear whether or not the *victim* was an Indian, the court in each instance assuming without particular discussion that in any event it was essential to show that the defendant was an Indian.

U. S. v. *Hadley*, 99 F. R., 437 (C. C. D. Wash., Hanford, D. J.).

U. S. v. *Ward*, 42 F. R., 320 (C. C. S. D. Cal., Ross, D. J.).

R. S. sections 2145, and 2146 and R. S. section 5339, which is applied by reference from 2145, are as follows:

SEC. 2145. Except as to crimes the punishment of which is expressly provided for in

this title, the general laws of the United States as to the punishment of crimes committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country.

SEC. 2146. The preceding section shall not be construed to extend to crimes committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes, respectively.

SEC. 5339. Every person who commits murder—

First. Within any fort, arsenal, dockyard, magazine, or in any other place or district of country under the exclusive jurisdiction of the United States.

* * * shall suffer death.

The exceptions made by R. S., sec. 2146, from the general terms of R. S., sec. 2145, covering only crimes by Indians against Indians, which is not this case, the court below had jurisdiction unless some further modification has in some way occurred so as to exclude crimes by whites against Indians.

Such a modification is claimed to result (1) from the fact that this reservation lies within the boundaries of a State, and (2) from the passage of the act of March 3, 1885, § 9 (23 Stat., 385). In our view

neither of these circumstances has this effect and crimes against Indians within their country still remain under the jurisdiction of the Federal courts.

I. The effect of the existence of the State governments.

The organization of States was held in *U. S.* v. *McBratney* (104 U. S., 621) and *Draper* v. *U. S.* (164 U. S., 240) to modify the Federal jurisdiction over Indian country by withdrawing from it the control of crimes there committed *by whites against whites*, and passing that control to the States—of course, in the absence of specific provision to the contrary. As to crimes, however, not exclusively among the whites, but *by or against Indians*, both these cases (if we understand them aright) reserved the question. This reservation and the summary basis for the actual decision were thus stated in the *Draper* case:

> It follows that a proper appreciation of the legislation as to Indians existing at the time of the passage of the enabling act by which the State of Montana was admitted into the Union adequately explains the use of the words relied upon and demonstrates that in reserving to the United States jurisdiction and control over Indian lands it was not intended to deprive that State of power to punish for crimes committed on a reservation or Indian lands *by other than Indians or against Indians*, and that a consideration of the whole subject fully answers the argument that the language used in the enabling act becomes

> meaningless unless it be construed as depriving the State of authority to it belonging in virtue of its existence as an equal member of the Union. *Of course the construction of the enabling act here given is confined exclusively to the issue before us, and therefore involves in no way any of the questions fully reserved in United States* v. *McBratney, and which are also intended to be fully reserved here* (p. 247).

The reservation made by the *McBratney* case and referred to in this passage from the *Draper* case was as follows:

> The record before us presents no question under the provisions of the treaty as to the punishment of *crimes committed by or against Indians*, the protection of the Indians in their improvements, or the regulation by Congress of the alienation and descent of property and the government and internal police of the Indians. The single question that we do or can decide in this case is that stated in the certificate of division of opinion, namely, whether the Circuit Court of the United States for the District of Colorado has jurisdiction of the crime of *murder committed by a white man upon a white man* within the Ute Reservation and within the limits of the State of Colorado * * * (104 U. S., p. 624).

Totally different considerations are presented by these reserved questions from those presented by the question on which the court ruled in these cases—considerations involving the whole distinction between the regulation of the domestic concerns of the whites

among themselves and the regulation of the intercourse between the Indians and the whites. As to the former matters, the reasonable and normal inference from the establishment of a State is that they passed to the State along with all other matters of purely local concern to its own people; but upon what can any such inference be based as to the subject of the relations between the Indians and the surrounding white citizens of the States?

The interrelations between the two races have from the first been the very subject matter of Federal control. This was the foundation of the decision in *Worcester* v. *Georgia*, 6 Pet., 515, 557–560, where the court set aside a statute of the State, which attempted to extend the State laws, civil and criminal, and under other provisions which the plaintiff in error had been convicted of, residing in the Cherokee country without a license from the Governor of Georgia. Chief Justice Marshall reviewed the whole history of the control over the relations between whites and Indians, both under the British sovereignty, under the Confederacy, and under the United States (pp. 535–560) and concluded that—

> *The whole intercourse between* the United States and this nation [the Cherokees] is, by our Constitution and laws, vested in the Government of the United States. The act of the State of Georgia, under which the plaintiff in error was prosecuted, is consequently void, and the judgment a nullity. (P. 560.)

The first act of Congress on the subject (act of July 22, 1790, c. 33; 1 Stat. L., 137, significantly entitled *"An act to regulate trade and intercourse with the Indian tribes"*) was directed to the prevention of intrusions by the whites upon the domain of the Indians, and made all crimes *by whites against Indians*, within that domain, crimes against the United States. It did not undertake to punish any crimes whatever *by* Indians, or even by whites against whites, but was limited exclusively to encroachments by whites upon the Indians in the lands recognized as Indian. The pertinent sections of this act, which clearly show this theory, are as follows:

> SEC. 5. *And be it furthur enacted*, That *if any citizen or inhabitant of the United States*, or of either of the territorial districts of the United States, shall go into any town, settlement, or territory belonging to any nation or tribe of Indians *and shall there commit any crime upon, or trespass against, the person or property of any peaceable and friendly Indian* or Indians, which, if committed within the jurisdiction of any State, or within the jurisdiction of either of the said districts, against a citizen or white inhabitant thereof would be punishable by the laws of such State or district, such offender or offenders shall be subject to the same punishment and shall be proceeded against in the same manner as if the offense had been committed within the jurisdiction of the State or district to which he or they may belong against a citizen or white inhabitant thereof.

> SEC. 6. *And be it further enacted*, That for any of the crimes or offences aforesaid the like proceedings shall be had for apprehending, imprisoning, or bailing the offender, as the case may be, and for recognizing the witnesses for their appearance to testify in the case, and where the offender shall be committed, or the witnesses shall be in a district other than that in which the offence is to be tried, for the removal of the offender and the witnesses or either of them, as the case may be, to the district in which the trial is to be had, as by the act to establish the judicial courts of the United States, are directed for any crimes or offences against the United States.

This act expired by limitation at the end of two years, but the same policy was continued for further periods by the acts of March 1, 1793 (1 Stat. L., 329); May 19, 1796 (1 Stat. L., 469); and March 3, 1799 (1 Stat. L., 743).

All of these acts were directed against intrusions by the whites into Indian country and created no crimes against the United States except those by such intruding whites against Indians.

Doubtless the ultimate motive of these early provisions for noninterference with the Indians was rather the protection of the surrounding whites from Indian outbreaks than the protection of the Indians themselves. In those days it was the Indian that menaced the white, and every precaution was taken to keep him isolated and undisturbed, lest he should

be aroused to reprisals. The function of the United States was analogous to that of protecting its citizens against foreign nations, and, as incidental thereto, regulating their intercourse with the foreign nations. This was all very clearly brought out by Chief Justice Marshall in his review of the history in *Worcester* v. *Georgia*, *supra*, and especially by the following passage:

> * * * What was of still more importance, the strong hand of the Government was interposed to restrain the disorderly and licentious from intrusions into their country, from encroachments on their lands, and from those acts of violence which were often attended by reciprocal murder (p. 552).

And he proceeded to discuss the position of the United States as "protector" of the Indians against intrusion or destruction by the whites.

This policy by which crimes by intruding whites against Indians were made crimes against the United States was continued through all the succeeding statutes and has never been reversed by any express provision.

The act of March 30, 1802 (2 Stat. L., 139), covered such crimes by whites against Indians by section 4; and then, by section 14, for the first time denounced crimes by Indians against whites, limiting its application to those occurring *outside* the Indian boundary. Thus the balance was completed—the United States preventing intrusions by whites into the lands set apart for the Indians, and intrusions by Indians

into lands set apart for whites, but dealing only with the interrelation between the two races and paying no heed to any relation of Indian to Indian or of white to white.

The next act was that of March 3, 1817 (3 Stat. L., 383), which carried the Government's control forward to all crimes within the Indian domains "*committed against any Indian or other person or persons,*" excepting "any offense committed by one Indian against another."

The act of June 30, 1834 (4 Stat. L., 729), and the act of March 27, 1854 (10 Stat. L., 269, p. 270), carried these provisions forward, and they ultimately became the sections 2145 and 2146, R. S., *supra*.

Historically, therefore, the relations between Indians and whites, including crimes by either against the other, and especially by whites against Indians, have been a chief subject matter of the Federal Government's control over Indian matters. Until very recent times, at any rate, the regulation of those relations has been directly important to the maintenance of peace between the whites and the Indian tribes—a clear function of the Federal Government. Certainly at the time of the decision in the *Draper* case, the danger of Indian outbreak was still a very live one; and it still so remained during the creation of the States in the western country, so that it stood opposed to any implied repeal of the statutes we have reviewed.

But aside from the function of the Federal Government to maintain peace between the whites and

the Indians, two other matters of perhaps greater importance in the more recent years are opposed to any implication of a surrender to the States of the subject of crimes by or against Indians, within Indian country—the duty of the United States to protect the Indians as its wards, and the obligation of the United States to protect their reservations.

As time has advanced, the original situation has become reversed, and the Government, instead of being, as at first, the guardian of the whites against the menace of the Indians, has become in large measure the guardian of the Indians against the menace of the whites. The protection of the Indians in their relations with the surrounding whites is probably the chief remaining duty of the United States within this field of its powers. This was vividly stated as follows in *Kagama* v. *U. S.* (118 U. S., 375), at p. 384:

> * * * They (the Indians) owe no allegiance to the States, and receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive and by Congress and by this court whenever the question has arisen.

The same considerations have been repeatedly stated in other decisions of this court, as, for instance, in *U. S.* v. *Rickert* (188 U. S., 432, 437), *Jones* v. *Meehan* (175 U. S., p. 10), and *Matter of Heff* (197 U. S., 488, 498); and see also Mr. Justice Van Devanter in *Rainbow* v. *Young* (161 F. R., 835, p. 837); and they form the basis of many of the later cases which have come before the court. A large number of these cases, for example, have involved the protection of the Indians against invasions of their property rights by the whites; and this court has held that by reason of the function of the United States as guardian, it can itself, as plaintiff, maintain such suits on their behalf, *Heckman* v. *United States* (224 U. S., 413) and many other cases have involved the protection of the Indians against intoxicating liquors introduced among them from the surrounding whites, e. g., *U. S.* v. *Sutton* (215 U. S., 291, 295), where the court said:

> Construing this, in connection with other provisions of the enabling act, it was held in *Draper* v. *United States* (164 U. S., 240), that it did not deprive the State of jurisdiction over crimes committed within a reservation by others than Indians or against Indians, following in this *United States* v. *McBratney* (104 U. S., 621). But in terms "jurisdiction and control" over Indian lands remain in the United States, and there being nothing in the section withdrawing any other jurisdiction than that named in *Draper* v. *United States*, undoubtedly Congress has the right to forbid

> the introduction of liquor and to provide punishment for any violation thereof. *Couture, Jr.*, v. *United States* (207 U. S., 581).

The court there held that the existence of the State government did not imply a repeal of these Federal liquor laws, passed for the protection of Indians in their country.

The same result was reached in *Hallowell* v. *United States*, 221 U. S. 317, where the provisions of the enabling act there involved were even less explicit.

In Ex parte *Webb*, 225 U. S. 696, the court regarded this obligation of the Federal Government as so weighty that it prevented an implied repeal of the Federal law against the introduction of liquor into the Indian Territory portion of Oklahoma from other States, even though the enabling act had expressly delegated to the State government the duty of protecting that Territory against local introductions.

The Federal function, as guardian of Indian wards, to protect their persons from criminal interference by whites intruding within their reservations, rests upon precisely the same considerations as are involved in the land cases and the liquor cases. The same hostility of the local whites, which has occasioned those litigations, and which was noticed in the *Kagama* and other cases cited, opposes an implication that the creation of State governments has implied a repeal of the Federal laws as affecting crimes by whites against Indians, or *vice versa*, and a delegation to the local State governments of the

control of these particular interrelations between their citizens and the whites.

Finally, the obligation assumed by the United States in assuring to Indians a *reservation* implies a duty of the United States to protect them from injurious intrusions therein by the neighboring whites. (*Worcester* v. *Georgia*, 6 Pet., at p. 556, 557.)

Thus Mr. Justice Van Devanter, when circuit judge, writing for the Circuit Court of Appeals for the Eighth Circuit, in *Rainbow* v. *Young*, 161 F. R., 835, held that the provisions of the Revised Statutes authorizing the commissioner to remove intruders from Indian reservations whose presence might, in his judgment, "be detrimental to the peace and welfare of the Indians," were still in force notwithstanding the fact that the reservation lay in the State of Nebraska and its Indians were citizens of that State and of the United States and held their lands under trust patents. Mr. Justice Van Devanter said:

> the United States maintains a reservation, an agency, and a training school for their benefit. In short, they are regarded as being in some respects still in a state of dependency and tutelage which entitles them to the *care and protection* of the National Government; *and when they shall be let out of that state is for Congress alone to determine* (p. 837).

The same policy was declared by Revised Statutes, Sec. 2114, which is as follows:

> The President is authorized to exercise general superintendence and care over any tribe

> or nation which was removed upon an exchange of territory under authority of the act of May twenty-eighth, eighteen hundred and thirty, "to provide for an exchange of lands with the Indians residing in any of the States or Territories, and for their removal west of the Mississippi"; *and to cause such tribe or nation to be protected, at their new residence, against all interruption or disturbance* from any other tribe or nation of Indians, or *from any other person or persons whatever.* (P. 389.)

A murder of an Indian by a white man on a reservation set apart by the United States for the exclusive use and occupancy of Indians is *per se* a violation of the reservation itself and of the obligation of the United States to protect it; and that plain obligation, as well as the obligation of guardianship and the obligation of maintaining peaceful relations between Indian and white, all oppose any repeal, not *expressly* made by Congress, of the acts concerning crimes in Indian country by whites against Indians or by Indians against whites. Rather does the existence of State governments indicate the reverse implications because of the increased local tendency to encroach upon the Indian reservations and the greater local control of the administration of justice.

In general, the organization of a State has not been held to operate to repeal the other criminal and penal sections in the titles of the Revised Statutes which regulate the "Government and protection of Indians" and the "Government of Indian country." The following of these penal sections have been held

to apply even where the offenders were not Indians, the sections being intended to protect the Indians against the surrounding whites.

Sec. 2116. Penalty for purchasing from Indian. (*U. S.* v. *Hunter*, 21 F. R., 615 (Mo., 1884), *Brewer, J.*)

Sec. 2117. Penalty for grazing cattle in Indian lands. (*U. S.* v. *Loving*, 34 F. R., 715 (Texas, 1888).)

Sec. 2118. Penalty for settling in Indian lands. (*U. S.* v. *Mullin*, 71 F. R., 682 (Nebr., 1895).)

Sec. 2119. Authority of commissioner and agent to protect Indians in peaceable enjoyment of their lands. (*U. S.* v. *Mullin, supra.*)

Secs. 2124, 2125. Recovery of penalties for violations of the provisions of the title. (*U. S.* v. *Crook*, 179 F., 391 (Nebr., 1875); *U. S.* v. *Payne*, 22 F. R., 426 (Kans., 1884).)

Sec. 2133. Penalty for trading without a license. (*U. S.* v. *Bridleman*, 7 F. R., 894 (Oreg., 1881).)

Sec. 2138. Penalty for removing cattle from Indian country. (*McKnight* v. *U. S.*, 130 F. R., 659; C. C. A., 9th C., Mont., 1904.)

Sec. 2139. Penalty for introducing or selling liquor. (*U. S.* v. *Sutton*, 215 U. S., 291 (Wash., 1909), *supra; Hallowell* v. *U. S.*, 221 U. S., 317 (Nebr., 1911), *supra.*)

Sec. 2148. Penalty for returning to Indian land after being removed. (*U. S.* v. *Howard*, 17 F. R., 638 (Oreg.,1883); *U. S.* v. *Stocking*, 87 F. R., 857; (Mont., 1898).)

Sec. 2149. Authority of commissioner to remove intruders by force. (*Rainbow* v. *Young*, 161 F. R., 835; C. C. A., 8th C., Van Devanter, J., 1908, Nebr.; *U. S.* v. *Mullin, supra.*)

All of these cases involved offenses by whites against the peace and security of the Indians not essentially different in respect to the Federal interest and Federal power from the general offenses covered by Revised Statutes, sec. 2145; as to which latter section see also the similar decisions cited at the beginning of this Point.

II. The effect of sec. 9 of the act of March 3, 1885.

But it is also urged that the operation of section 2145 has been limited so as to exclude crimes by whites against Indians by section 9 of the act of March 3, 1885 (23 Stat. L., 385), which is as follows:

> That immediately upon and after the date of the passage of this act all Indians, committing against the person or property of another Indian or other person any of the following crimes, namely, murder, manslaughter, rape, assault with intent to kill, arson, burglary, and larceny within any territory of the United States, and either within or without an Indian reservation, shall be subject therefor to the laws of such territory relating to said crimes, and shall be tried therefor in the same courts and in the same manner and shall be subject to the same penalties as are all other persons charged with the commission of said crimes, respectively; and the said courts are hereby

> given jurisdiction in all such cases; and all such Indians committing any of the above crimes against the person or property of another Indian or other person within the boundaries of any State of the United States, and within the limits of any Indian reservation, shall be subject to the same laws, tried in the same courts and in the same manner, and subject to the same penalties as are all other persons committing any of the above crimes within the exclusive jurisdiction of the United States.

This act contains no express repeal of R. S., section 2145.

Re Wilson (140 U. S., 575), if we understand it correctly, is a direct authority against this contention. There the question was whether the murder of a negro by a negro on an Indian reservation within a Territory fell within the jurisdiction of the United States court under R. S., 2145, or of the Territorial court, as would be the case if R. S., 2145, had been repealed by the act of 1885. The decision was that the act of 1885 did not give up the jurisdiction of the United States court, under R. S., sec. 2145, over this crime.

The contention that the act of 1885 in some way involves a repeal of R. S. section 2145 by some implication is in flat disregard of the whole history of the legislation on the subject.

In fact, this act was passed in order to repeal, as to the specified major crimes, not R. S., sec. 2145, but R. S., sec. 2146, *supra*, by which all crimes by

Indians against Indians had been excluded from the operation of R. S., sec. 2145, and left to the Indian tribal control. The practical effect was to bring these specified crimes within R. S., sec. 2145, by striking them out of the exceptions made to it by R. S., sec. 2146.

As we have shown above in the review of the various Indian intercourse acts from the beginning, it was not until the act of March 30, 1802 (2 Stat. L., 139), that *any* crimes *by Indians* were made crimes against the United States. Theretofore it had been *only* crimes *by whites against Indians* that were denounced by Congress. Even in the act of 1802 no crimes by Indians were touched except those *outside* of the Indian domain, all matters within that domain being left exclusively to the Indian tribal control excepting crimes by whites intruding against the Indians. (See *Worcester* v. *Georgia*, as to the self-government of the Indians, and this function of Congress, 6 Pet., at p. 547.) The succeeding statutes (acts of March 3, 1817, 3 St. L., 383; June 30, 1834, 4 St. L., 479; and March 27, 1854, 10 St. L., 269) all applied to all crimes in Indian country *expressly excepting crimes by Indians against Indians;* and such also were the terms of R. S. sections 2145 and 2146, *supra*.

The act of 1885 reversed this long-established policy of noninterference with the internal affairs of the Indians and wiped out these express exceptions so far as concerned the specified and major crimes. The immediate occasion and purpose of its enact-

ment were described in *Kagama* v. *U. S.* (118 U. S., 375), as follows:

> The case of *Crow Dog* (109 U. S., 556), in which an agreement with the Sioux Indians, ratified by an act of Congress, was supposed to extend over them the laws of the United States and the jurisdiction of its courts, covering murder and other grave crimes, shows the purpose of Congress in this new departure [i. e., the act of March 3, 1885]. The decision in that case admits that if the intention of Congress had been to punish, by the United States courts, the murder of one Indian by another, the law would have been valid. But the court could not see, in the agreement with the Indians sanctioned by Congress, a purpose to repeal section 2146 of the Revised Statutes, which expressly excludes from that jurisdiction the case of a crime committed by one Indian against another in the Indian country. The passage of the act now under consideration was designed to remove that objection, and to go further by including such crimes on reservations lying within a State. (P. 382.)

In *Ex parte Crow Dog* (109 U. S., 556), here referred to, it was contended by the Government that R. S., section 2146, had been repealed, so far as concerned the Sioux Tribes, by a treaty made on April 29, 1868 (15 Stat., 635), reaffirmed and extended by a further agreement which had been passed into law by the act of February 28, 1877 (19 Stat., 254). The

treaty (15 Stat., 635) provided, among other things, as follows:

> If bad men among the whites, or among other people subject to the authority of the United States, shall commit any wrong upon the person or property of the Indians, the United States will, upon proof made to the agent and forwarded to the Commissioner of Indian Affairs at Washington City, proceed at once to cause the offender to be arrested and punished according to the laws of the United States, and also reimburse the injured person for the loss sustained.
>
> If bad men among the Indians shall commit a wrong or depredation upon the person or property of anyone, white, black, or Indian, subject to the authority of the United States and at peace therewith, the Indians herein named solemnly agree that they will, upon proof made to their agent and notice by him, deliver up the wrong-doer to the United States, to be tried and punished according to its laws; and in case they willfully refuse so to do, the person injured shall be reimbursed for his loss from the annuities or other moneys due or to become due to them under this or other treaties made with the United States. And the President, on advising with the Commissioner of Indian Affairs, shall prescribe such rules and regulations for ascertaining damages under the provisions of this article as in his judgment may be proper. But no one sustaining loss while violating the provisions of this treaty or the laws of the United States

shall be reimbursed therefor. (Quoted 109 U. S., p. 563.)

The contention of the Government was that by this treaty the exceptions made to R. S., sec. 2145, by R. S., sec. 2146, had been repealed, so as to make the murder of one Sioux by another Sioux a crime against the United States. The court held, however, that the treaty related only to crimes by Sioux against others than Sioux and did not impliedly or expressly repeal the exception as to the internal affairs of the Sioux among themselves. The opinion discusses fully (p. 571) the policy by which these internal affairs have always been left to the regulation of the Indians themselves, and concludes as follows:

> The provisions now contained in §§ 2145 and 2146 of the Revised Statutes were first enacted in § 25 of the Indian Intercourse Act of 1834, 4 Stat. 733. Prior to that, by the act of 1796, 1 Stat. 245, and the act of 1802, 2 Stat. 139, offenses committed by Indians against white persons and by white persons against Indians were specifically enumerated and defined, and those by Indians against each other were left to be dealt with by each tribe for itself, according to its local customs. The policy of the Government in that respect has been uniform. As was said by Mr. Justice Miller, delivering the opinion of the court in *United States* v. *Joseph*, 94 U. S. 614, 617:
>
> "The tribes for whom the act of 1834 was made were those semi-independent tribes whom our Government has always recognized as exempt from our laws, whether within or

> without the limits of an organized State or Territory and, in regard to their domestic government, left to their own rules and traditions, in whom we have recognized the capacity to make treaties, and with whom the Governments, State and National, deal, with a few exceptions only, in their national or tribal character, and not as individuals."
>
> To give to the clauses in the treaty of 1868 and the agreement of 1877 effect, so as to uphold the jurisdiction exercised in this case, would be to reverse in this instance the general policy of the Government toward the Indians, as declared in many statutes and treaties, and recognized in many decisions of this court, from the beginning to the present time. To justify such a departure in such a case requires a clear expression of the intention of Congress, and that we have not been able to find. (109 U. S. pp. 571–2.)

The view expressed in the passage quoted, *supra*, from the *Kagama* case that the act of 1885 was occasioned by this decision is confirmed by what occurred in Congress during its enactment, and especially by the report of the Secretary of the Interior quoted in the course of the following discussion by Mr. Cutcheon, of Michigan (16 Cong. Rec., pt. 2, 48 Cong., 2d sess., pp. 934–5):

> Mr. Chairman, I believe it is not necessary for me to say that this amendment is in the direction of the thought of all who desire the advancement and civilization of the Indian tribes. It is recommended very strongly by

the Secretary of the Interior in his annual report. I believe we all feel that an Indian, when he commits a crime, should be recognized as a criminal, and so treated under the laws of the land. I do not believe we shall ever succeed in civilizing the Indian race until we teach them regard for law, and show them that they are not only responsible to the law, but amenable to its penalties.

I would not offer this amendment at the present time, and in connection with this appropriation bill, if I thought there existed the least chance or opportunity of its becoming law in any other way. If I believed it possible that a bill of the Committee on Indian Affairs, upon which, as I understand, a like amendment is intended to be proposed, could be taken up and passed at this session, I would not now submit this proposition. But I believe this is the only opportunity that will be afforded during this Congress for this or similar legislation.

We all remember the case of Crow Dog, who committed the murder of the celebrated chief, Spotted Tail. He was arrested, tried by a Federal tribunal, and convicted of the murder, but the case being taken to the Supreme Court of the United States upon habeas corpus, it was there decided that the United States courts had no jurisdiction in any case where one reservation Indian committed a crime upon another; thus Crow Dog went free. He returned to his reservation, feeling, as the Commissioner says, a great deal more important than any of the chiefs of his tribe. The result was that another murder grew out

of that—a murder committed by Spotted Tail, jr., upon White Thunder. And so these things must go on unless we adopt proper legislation on the subject.

It is an infamy upon our civilization, a disgrace to this Nation, that there should be anywhere within its boundaries a body of people who can, with absolute impunity, commit the crime of murder, there being no tribunal before which they can be brought for punishment. Under our present law there is no penalty that can be inflicted, except according to the custom of the tribe, which is simply that the "blood-avenger"—that is, the next of kin to the person murdered—shall pursue the one who has been guilty of the crime and commit a new murder upon him. (P. 934.)

* * * * *

I will ask the gentleman from California (Mr. Budd) to make a statement in that regard. Now, the Secretary of the Interior, in his last annual report, uses the following language:

"I again desire to call attention to the necessity for legislation for the punishment of crimes on the Indian reservations. Since my last report the Supreme Court of the United States decided, in the case of '*Ex parte* Crow Dog,' indicted for murder, that the district court of Dakota was without jurisdiction when the crime was committed on the reservation by one Indian against another. If offenses of this character can not be tried in the courts of the United States there is no tribunal in which the crime of murder can be punished. Minor offenses may be punished through the agency

of the 'court of Indian offenses,' but it will hardly do to leave the punishment of the crime of murder to a tribunal that exists only by the consent of the Indians of the reservation. If the murderer is left to be punished according to the old Indian custom, it becomes the duty of the next of kin to avenge the death of his relative by either killing the murderer or some one of his kinsmen."

That is Indian law—not a very inviting kind of law where one murder is to be punished by the commission of one or more additional murders.

"The laws of the State or Territory wherein the reservation is situated ought to be extended over the reservation, and the Indians should be compelled to obey such laws and be allowed to claim the protection thereof."

I now yield to the gentleman from California to answer the question of the gentleman from Indiana.

Mr. BUDD. * * *

The objection by the Senate committee to my amendment was that it punished misdemeanors as well. It will be found in the record of the last session, on the day when the conference report was concurred in by this House, that the gentleman from Louisiana, in answer to a question from myself, stated that they believed the amendment was a proper one; that it was in the right direction, but that it punished misdemeanors and offenses by one Indian upon another of a minor character that ought not to be so punished, and that it was understood if the same amendment was

> ered at this session of Congress so as only to punish felonies, it would be acceptable to the committee and be adopted (p. 935).

That the purpose of the act of 1885 was to reverse (as to the major crimes) the former policy by which all crimes between Indians were excepted by R. S., sec. 2146 from R. S., sec. 2145, also appears from the following cases:

> *Gon-shay-ee, petitioner*, 130 U. S., 343 at p. 350; *in re Wilson*, 140 U. S., 575, p. 578; *U. S.* v. *Whaley*, 37 F. R., p. 145; *U. S.* v. *Ewing*, 47 F. R., 809; *Ex parte Hunt*, 157 F. R., 130; *re Blackbird*, 109 F. R., 139; *Goodson* v. *U. S.*, 7 Okla., 117 at p. 126.

Incidentally we may notice that the former policy of noninterference with crimes of Indians against Indians has in some cases been perpetuated by special enactment even since the act of 1885,

> *Talton* v. *Mayes*, 163 U. S., 376.
> Murder of one Cherokee by another within Cherokee Nation—Act May 2, 1890, c. 182.
> *Ex Parte Mayfield*, 141 U. S., 107.
> Also under Cherokee act, *supra*.

and also that the crimes not specified by the act of 1885 are considered to be still excepted by R. S., sec. 2146, from R. S., sec. 2145, which are assumed to be still existing law.

> *Ex Parte Hart*, 157 F. R., 130.
> *U. S.* v. *King*, 81 F. R., 625.

The act of 1885 has never been regarded as forming a complete statement of the Federal penal jurisdic-

tion in Indian country. The other sections of the Revised Statutes preceding and following sec. 2145, and dealing with specified offenses against Indians, have uniformly been considered to have continued in force even since the passage of the act of 1885. (See the cases decided since 1885 which are included in the statement of sections of the Revised Statutes and authorities thereunder set forth at the end of Section I of this Point.)

In *United States* v. *Cardish*, 145 F. R., 242 (Ore., 1906), R. S., sec. 2143, which deals with arson, was held to be " by necessary implication repealed by the act of 1885 *so far as it is repugnant to the later act*" (p. 246). The case dealt with the crime of arson by an Indian, which fell expressly and directly within the terms of the act of 1885.

SECOND.

An "Indian reservation" is "Indian country."

The point made is that the term "Indian country" includes only land to which the original Indian title has never been extinguished and does not include an Indian reservation set apart for exclusive Indian occupancy out of the public domain.

This point arises on the face of the indictment, which charges that the crime occurred in "a certain Indian reservation, commonly known as," etc., instead of alleging that it occurred in "Indian country."

The question is disposed of by *In re Wilson*, 140 U. S., 575, and *United States* v. *Thomas*, 151 U. S.,

577, p. 582, where it was held that the establishment by Executive proclamation of an Indian reservation out of lands to which the title lay in the United States constituted such lands "Indian country." (See also *United States* v. *Leathers*, 6 Sawyer, 17; *United States* v. *Martin*, 14 F. R., p. 821; *United States* v. *Bridleman*, 7 F. D., 898.)

THIRD.

The extension of the Hoopa Valley Reservation was lawful.

The point suggested is that under the act of April 8, 1864 (the pertinent section of which is set out at pages 12 and 13 of the brief for plaintiff in error), the Hoopa Valley Reservation having once been prescribed by the presidential proclamation of June 23, 1876 (1 Kappler, Indian Laws and Treaties, p. 815), could not lawfully be enlarged as attempted by President Harrison's order of October 16, 1891.

This point, also, arises on the face of the indictment.

1. Even assuming the suggested construction of the act of 1864 and that it precludes the extension of any reservation excepting those then existing, this extension is still valid because it was an extension not only of the Hoopa Valley Reservation specifically referred to, but also of the old Klamath River Reservation which was in existence at the time of the passage of the said act of 1864. (See the History of the original Klamath River Reservation, set forth at

length in 33 Decisions Department of Interior Relating to Public Lands, p. 205.)

The old Klamath River Reservation ran from the Pacific Ocean 20 miles up the Klamath River. The proclamation of President Harrison continued the reservation from this point on up to the boundary of the Hoopa Valley Reservation.

2. Even disregarding this fact and still assuming that the act of 1864 can properly be construed as making such a limitation, the point is disposed of by *In re Wilson*, 140 U. S., 575, in which the general power of the President to create an Indian reservation out of public lands was upheld, especially under the act of February 8, 1887 (24 Stat., 388, c. 119, sec. 1), which is equally applicable to authorize the Executive order here concerned. The pertinent clause is as follows:

> That in all cases where any tribe or band of Indians has been or *shall hereafter be located upon any reservation created for their use*, either by treaty stipulation or by virtue of an act of Congress *or Executive order setting apart the same for their use*, the President of the United States be, and he hereby is, authorized, whenever in his opinion any reservation, or any part thereof, of such Indians is advantageous for agricultural and grazing purposes, to cause said reservation, or any part thereof, to be surveyed, or resurveyed if necessary, and to allot the lands in said reservation in severalty to any Indian located thereon, in quantities, as follows.

(See also, in addition to the Wilson case, supra, *Spalding* v. *Chandler*, 160 U. S., 394, 403; *United States* v. *Leathers*, 6 Sawyer, 17; *United States* v. *Grand Rapids & I. R. Co.*, 154 Fed., 131; *Gibson* v. *Anderson*, 131 Fed., 39, 41; *United States* v. *Martin*, 14 Fed., 817, 821; *United States* v. *Payne*, 8 Fed., 883, 887, 888; 14 Ops. Atty. Gen., 181; 17 Ib., 258; 26 Ib., 92; 28 Ib., 143.)

3. In any event, ever since President Harrison's proclamation, this land has been *de facto* an Indian reservation reserved exclusively for their use and, irrespective of any possible question of the President's original power to create it, is *de facto* Indian country and to be treated as such. (*Worcester* v. *Georgia*, 6 Peters, 515; *Fellows* v. *Blacksmith*, 19 How., 366; *Kagama* v. *United States*, 118 U. S., 375, 384; *Spalding* v. *Chandler*, 160 U. S., 394, 403, 404.)

Congress was advised of the extension immediately after it was made, by the report of the agent at the Hoopa Valley Agency, dated August 15, 1892, in which he said:

> This tribe (the Lower Klamath Tribe) occupies a strip of country recently annexed to the reservation, extending from the mouth of the Trinity River along the Klamath River to the Pacific Ocean.

He proceeds to report in detail as to them. (House, Ex. Doc., 2d sess. 52d Cong., 1892–3, vol. 13, p. 230.)

They were again described in the next report as occupying "territory 1 mile in width on each side of the Klamath River, from the mouth of the Trinity to the ocean, a distance of about 50 miles as the

river runs," etc. (House Ex. Doc., 3 sess., 53d Cong., 1894–95, vol. 15, p. 117.)

Ever since, they have been carried in the statistics annually submitted to Congress as "Lower Klamath" under "Hoopa Valley Agency" (House Doc., 1 sess., 54th Cong., 1895–96, vol. 15, p. 564), or now under "Hoopa Valley School" (report Dept. Int., 1910, administration reports, vol. 2, p. 61).

The maps transmitted to Congress in these reports down to the present time have all indicated this extension, excepting that the half of it nearest the mouth of the river (below the *locus in quo*) has in the later years been omitted, having apparently been allotted under the act of June 17, 1892 (27 Stat. L., 52), so that the reservation now stands as shown on the map hereto annexed. This map we have copied from Rand & McNally's Atlas because it is on a larger scale and shows the situation more completely than the maps attached to the reports of the Commissioner of Indian Affairs, but it accords entirely with these official maps which, as stated above, have been continued down to date to show this extension.

After the proclamation of President Harrison dated October 16, 1891, Congress passed the act referred to above, of June 17, 1892 (27 Stat. L., 52), opening up for settlement "the lands embraced in what was Klamath River Reservation in the State of California, as set apart and reserved under authority of law by an Executive order dated November six-

teenth, eighteen hundred and fifty-five," and as stated, this included about one-half of the lands which were described by President Harrison's proclamation. The other half, however, was left undisturbed and Congress has never disturbed it nor in any way disapproved the executive interpretation of the act of 1864. On the contrary, it has regularly made the usual appropriations which have been applied to the entire Hoopa Valley Reservation as extended.

FOURTH.

The point that the place of the crime was covered by a valid mining claim is not properly raised by the bill of exceptions, and is not sound on the merits.

By the terms of the proclamation defining the extension, any tract "to which valid rights have attached under the laws of the United States" were excluded. The *locus in quo* is claimed to be excluded by this provision because of the filing of a mining location which is set forth at page 38 of the Transcript of Record.

1. This point is sought to be raised under Specification of Error III (Brief, p. 6), which specifies a refusal to instruct the jury as follows:

> The indictment alleges that the offense set up therein was committed within what is called the extension of the Hoopa Valley Indian Reservation, in Humboldt County, California, and you are hereby instructed that this extension consists of a strip of territory one mile in width on each side of the Klamath River, from the northern limits of said Hoopa Valley Res-

> ervation to a point twenty miles from the mouth of said river, excluding from the limits thereof any land to which valid rights may have attached.

No specific request was made for any charge concerning the alleged mining claim.

The only exception was as follows:

> The defendant excepts to each and every instruction requested by the Government, and given by the court, and to each and every instruction requested by the Government and modified, and given as so modified, by the court, and to each and every instruction requested by the defendant and refused by the court, or given as so modified, and to each and every instruction given by the court of its own motion. (Tr., p. 51.)

This exception is too vague, obscure, and general to render the omission to charge concerning this mining claim reviewable.

> *Allis* v. *United States*, 155 U. S., 117 (all and each part).
>
> *People* v. *Bristol*, 23 Mich., 118 (same).
>
> *Connecticut Mutual Life Ins. Co.* v. *Union Trust Co.*, 112 U. S., 250.
>
> *Holder* v. *U. S.*, 150 U. S., 91.
>
> *Hicks* v. *U. S.*, 150 U. S., 442.
>
> *Hickory* v. *U. S.*, 151 U. S., 303, 316.
>
> *Thiede* v. *Utah*, 159 U. S., 510.
>
> *U. S.* v. *Hough*, 103 U. S., 71.
>
> *Edgington* v. *U. S.*, 164 U. S., 361.
>
> *Braim* v. *U. S.*, 164 U. S., 221.

Richards v. *U. S.* (C. C. A.), 175 Fed., 91.
Ball v. *U. S.* (C. C. A.), 147 Fed., 32; 202 U. S., 600.

The record indicates that all the requests to charge submitted by defendant were submitted in a lump and not separately and *seriatim*, and that only the above general exception was taken. (Tr., pp. 50–1.) Under such circumstances the court's ruling is not error if any one proposition was erroneous and properly rejected.

Thiede v. *Utah*, 159 U. S., 510.
U. S. v. *Hough*, 103 U. S., 71.
Union Ins. Co. v. *Smith*, 124 U. S., 405.
Shelp v. *U. S.* (C. C. A.), 81 Fed., 694.
Richardson v. *U. S.* (C. C. A.), 181 Fed., 1.

2. Even if, however, the court is to pass the technical defect on the theory of *Wiborg* v. *U. S.*, 163 U. S., 632, and *Weems* v. *U. S.*, 217 U. S., 349, there was no merit in the contention and the court was justified in ignoring the alleged mining claim as immaterial.

In the first place, the claim did not include the *locus in quo*. The claim is described at page 38 of the Transcript and is apparently sought to be connected with the *locus in quo*, partly by the testimony of Mrs. Catherine Goodwin that she was "acquainted with a mine *in the vicinity of* Johnson's or Wahtec" (Tr., p. 37), and partly by a map which is described at Tr., p. 37; but the lots 8 and 9 which appear to be the ones claimed specifically as covering the *locus in quo* are stated in the description of the map not to include

"the portion occupied by the river" (Tr., p. 37), and it was in this portion that the crime indisputably and concededly occurred.

In the second place, the record is utterly barren of any evidence that the mining claim was a "valid" right "attached" so as to prevent operation of the grant to the Indians. There was no evidence that it was ever made good under the requirements of R. S., 2324, or that, for example, the amount of work there required "as necessary to hold possession" was ever done, or that the location was physically marked on the ground, or that it had not been lost by abandonment or nonuser.

Black v. *Elkhorn Mining Co.*, 163 U. S., 445, p. 450.

Belk v. *Meagher*, 104 U. S., 279, p. 282.

Spalding v. *Chandler*, 160 U. S., 394, at 404–5.

M., K.& T. Ry. v. *Roberts*, 152 U. S., 114, 116, 118.

Gillis v. *Downey* (C. C. A., 8th C.), 85 F. R., 483, 489.

For all that the record shows, this claim was subject to relocation, and if so, no "valid rights" existed at the time of the grant to the Indians which would have prevented the inclusion of this land by the Executive order.

FIFTH.

The point that the place of the crime was excluded from the extension because of the existence of a State school district is not properly raised by the bill of exceptions, and is not sound on the merits.

The technical difficulties on the record are the same as are discussed in the preceding point. It is sought to be raised under the same specification of error and the same exception. The description of the school district appears at page 38 of the Transcript.

But on the merits, whatever right the State may have had in this respect is settled to be subordinate to the Indian right of occupation. (*United States* v. *Thomas*, 151 U. S., 577, p. 583, and cases there cited, especially *Beecher* v. *Weatherby*, 95 U. S., 517, 525.)

SIXTH.

The point that the river bed was not within the reservation is not properly raised in the record, and is not sound on the merits.

It is undisputed that the crime occurred within the river bed.

The claim is that the river is navigable and therefore that the State has jurisdiction over it.

1. The first exception was taken upon the denial of a motion to dismiss when the Government first rested. (Tr., p. 22.) This motion was not renewed and under the rule was waived.

Columbia R. R. Co. v. *Hawthorne*, 144 U. S., 202.

Bogk v. *Gassert*, 149 U. S., 17.

Union Pacific Ry. Co. v. *Daniels*, 152 U. S., 684.

Perovich v. *United States*, 205 U. S., 86, 91.

Nor is this exception specified (Brief, pp. 5–7), but it was assigned (Tr., p. 60).

The other exception is the same general exception to the refusals to charge which is discussed in connection with the preceding two points. The only requests to charge concerning the river were in effect requests to direct a verdict and to rule as matter of law that the river was navigable and not within the reservation. (Specifications IV and V, Brief, p. 6.)

2. On the merits, however, the point is not sound.

By the law of the State of California the river is not navigable. It is true that the California statute of April 23, 1880, c. 122, declared it to be navigable from its mouth to the town of Orleans Bay (which includes the *locus in quo*), but this was repealed by the act of February 24, 1891, c. 14; and by the act of March 11th of the same year, c. 92, an enumeration of the navigable rivers of California was made which did not include the Klamath River and which is held to be an exclusive list of the navigable rivers of the State, no others being, under the law of that State, navigable. (*Caldwell* v. *County of Sacramento*, 79 Cal., 347, 349.)

Thus the State of California appears to have abandoned any claim that it may have had to the bed of this stream and surrendered such rights to the riparian proprietors—in this case the United States, for the benefit of the Indians.

If, however, the navigability of the river is otherwise to be determined as a question of fact, it was a question for the jury (*Leovy* v. *United States*, 177 U. S., 621, p. 634–5, *semble*), and the evidence here shows very slight evidence of navigability even for small boats and rafts. Certainly on the evidence the defendant was not entitled to the *peremptory* instruction which he asked. (Tr., p. 51.) He did not ask the court to charge the jury at all on the question of navigability excepting in so far as that question is indirectly involved in this request for a peremptory instruction that the river was not within the reservation; and no exception was taken to the failure of the court to charge on the subject.

SEVENTH.

As to the exclusion of the hearsay testimony of the alleged confession.

Due objection and exception were made to the refusal of the court to receive testimony from William Norris to the effect that one Joe Dick, since deceased, had confessed to him that he committed the murder. (Tr., p. 35–6.)

The question is whether declarations against penal interests are admissible, on analogy to the declarations against pecuniary or proprietory interest.

The passages quoted by the brief for the plaintiff in error (p. 30–31) from Professor Wigmore's evidence, present very weighty considerations against the established rule on this point. So far as we are aware there is no case in the Federal courts in which the point has

been decided excepting *United States* v. *Mulholland*, 50 F. R., 413, in the District Court for the District of Kentucky (Barr, district judge), where the prevailing rule was followed and the evidence held not admissible. The court elaborately reviewed the authorities on the subject. A writ of error was taken out to the Supreme Court, but on motion of the plaintiff in error it was dismissed. (149 U. S., 782.)

CONCLUSION.

The judgment should be affirmed, or, if reversed on the jurisdictional grounds, should be reversed on condition that the plaintiff in error be delivered over to the proper authorities of the State of California to be further dealt with as may to them seem best. (*Draper* v. *U. S.*, 164 U. S., 241; *U. S.* v. *McBratney*, 104 U. S., 624.)

WINFRED T. DENISON,
Assistant Attorney General.

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COPY OF RAND & McNALLY'S MAP OF THE NORTHERN PORTION OF CALIFORNIA SHOWING THE HOOPA VALLEY INDIAN RESERVATION AS EXTENDED.

The dotted line following the meander of the river indicates the part of the extension which is still maintained. The similar strip extending on to the mouth of the river was the old Klamath River Reservation, which was also covered by President Harrison's proclamation but was opened up to settlement by the act of June 17, 1892, supra.

In the

Supreme Court of the United States.

OCTOBER TERM, 1912.

JAMES DONNELLY, PLAINTIFF IN ERROR,
v.
THE UNITED STATES. } No. 97.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

PETITION FOR RE-HEARING.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:—

Plaintiff in error herein respectfully asks for a rehearing in this cause.

But before stating the grounds counsel desire to state that they fully appreciate that this Honorable Court, in view of the great number of cases always pending before it, involving an immense amount of labor and investigation and affecting the welfare of the whole land, should not be imposed upon or its valuable time taken up, by having frivolous matters or questions without merit presented to it for consideration.

Sincerely believing that this application does not vio-

late this principle that should govern attorneys in their conduct toward the Court in which they are entitled to practice or represent litigants, counsel presents on behalf of plaintiff in error the following grounds on which is asked a reconsideration of this cause, to-wit:

(1) That the decision of the Court to the effect that a murder by a white citizen of an Indian on an Indian Reservation within the limits of a state is punishable under Sections 2145 and 5359 of the Revised Statutes is erroneous in that it is contrary to the long established rule of this Honorable Court for interpretating Federal Statutes, to-wit:—

> "Where the language of an act is general and broad enough to include wrongful acts without and within the constitutional power of congress, the unconstitutional parts cannot be rejected and the constitutional parts retained in order to give effect to the statute; that words of limitation cannot be introduced into a penal statute to make it specific when as expressed, it is general only."

(2) That the decision to the effect that it is the law of the State of California that no rivers in California are navigable except those enumerated in the act of March 11, 1891, ch. 92, (Political Code, Sec. 2349) of said state, and that the riparian owner takes to the center of stream on all rivers not enumerated in said act, thereby giving the United States title to the bed of said Klamath River, is erroneous for three reasons, to-wit:

> (a) That it is contrary to the rules laid down by the Supreme Court of California, in the cases

of *People v. Elk River M. & L. Co.,* (107 Cal. 224), and *Forrester v. Johnson,* (44 Cal. Dec. 471, No. 2350, decision dated Oct. 1, 1912), which rules are: That the State Legislature cannot make a stream navigable by merely enacting a law declaring it to be such; that the question of navigibility always remains "open as a question of fact," in California.

(b) That it is contrary to the rule laid down in *People v. Kerber,* (152 Cal. 731), in which the same Court declared that where the public use is abandoned such as the use of navigable waters as a public highway, the title to the property is not lost to the state, but the state holds the same as a proprietor even though it no longer holds the same as a public agent or sovereign in charge of a public use.

(c) That it is contrary to the constitution of the State of California, directly applied in *People v. Kerber, supra,* which provides that no gift of any state property can be made by the legislature, which would result if by repealing an act declaring a stream navigable, the riparian owners would be given the title to the bed of the stream, which before belonged to the state.

Section 2145 Revised Statutes Unconstitutional Under Federal Rule of Interpretation.

Section 2145 of the Revised Statutes is couched in

general and not specific terms and applies to and includes within its term all persons not Indians committing offenses in the Indian Country against all persons whether Indian or not. It is worded as follows:

> "Except as to crimes the punishment of which is expressly provided for in this Title, the general laws of the United States as to the punishment of crimes committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian Country."

By Section 2146 of the Revised Statutes Indians are excepted from the provisions of said Section 2145, but no other exceptions as to crimes have been or were ever made under Title XXXVIII "Indians" which comprises Sections 2039-2157, inclusive, Revised Statutes, and which is the Title referred to in Section 2145. Therefore Section 2145 includes generally and covers by its terms any offense committed by a white person or any person other than an Indian in the Indian Country for which such person would be amenable to the Federal authorities if committed in any place within the sole and exclusive jurisdiction of the United States. By the terms of Section 2145 and all other sections under the same Title, a white person is amenable to Federal authorities whether the crime is committed against a red, a white, a black, or a yellow person so long as it is committed in the Indian Country. That the punishment of a white person for the murder of a white person in the Indian

Country is within the terms of Section 2145 was held in *Westmoreland vs. United,* (155 U. S. 547, 39 L. ed. 225), but the offense was committed in Indian Territory clearly "Indian Country."

But when the attempt is made to apply said section to an Indian Reservation within an organized state the section applies only in part, that is, it applies only to a white or a person not an Indian committing a crime against an Indian. It in no way applies to a white or other person not an Indian committing a crime against a white or other person not an Indian. The crimes committed by Draper and McBratney (murder by a white man of a white man and a negro by a negro respectively on Indian Reservation in the States of Colorado and Montana respectively)—*Draper v. United States* (164 U. S. 640, 41 L. ed. 419), *McBratney v. United States,* (104 U. S. 621, 26 L. ed. 869) came as clearly within the terms of Section 2145 as that of the crime committed by Westmoreland (murder of a white by a white in Indian Territory, *Westmoreland v. United States, supra,* The result then is that Section 2145 is broad enough to cover all offenses committed by a white person in the Indian Country that he could be punished for if he had committed them, in a place within the sole and exclusive jurisdiction of the United States. In one place therefore it has a broad and general application in accordance with its terms while in another place such as Indian Reservation within a state it becomes specific in its application and a certain and particular class must be exempted from its provisions in order to give it effect.

Congress therefore, as held in *McBratney v. United States, supra,* has not the power to punish a white person for the murder of a white person or a negro for the murder of a negro committed on an Indian Reservation within a state. For it is beyond the constitutional power of Congress to punish such offenses unless sole and exclusive jurisdiction over the particular reservation is reserved by the United States in the enabling act permitting the organization of the state government or there is afterwards a cession to the United States by the state of its jurisdiction over the territory covered by the reservation. An exercise of such power by Congress would violate, as was held in *McBratney v. United States, supra,* that constitutional principle that all states are admitted into the Union on an equality and would divest the state *pro tanto* of equal authority and jurisdiction over its citizens usually enjoyed by other states. Congress then has no power to punish a citizen of California for a crime against another citizen within the Hoopa Valley Reservation or the extension thereof since California never ceded its jurisdiction over the territory covered by such reservation or the extension thereof, nor was jurisdiction reserved by the national government upon the admission of California into the Union, and if it were held that Congress had such power, it would be depriving California of jurisdiction *pro tanto* over its citizens enjoyed by other states.

It necessarily follows that Section 2145 cannot be applied to an Indian Reservation in California unless an exception of a certain class constitutionally exempted

such as an offense by one white citizen against another white citizen, is read into its general and comprehensive terms. That an exception of such constitutionally exempted class cannot be read into Section 2145, the terms of which clearly include and cover such constitutionally exempted class, is supported by a long line of decisions of this Honorable Court, and other Federal Courts. As was said in *United States v. Ju Toy*, (198 U. S. 645, 25 Sup. Ct. 646):

"That has been decided over and over again."

The following cases support this rule of interpretation for Federal Statues nor are there any decisions in conflict therewith, to-wit:

United States v. Reese, (92 U. S 214, 23 L. ed. 565);

Trade-Mark cases, (100 U. S. 82, 98, 99, 25 L. ed. 550);

Allen v. Louisiana, (103 U. S. 80, 84; 26 L. ed. 318, 319);

United States v. Harris, (106 U. S. 629, 641, 642; 27 L. ed. 290, 294, 295; 1 Sup. Ct. Rep. 601);

Poindexter v. Greenhow, (114 U. S. 269; 29 L. ed. 185, 197; 5 Sup. Ct. Rep. 903, 962);

Baldwin v. Franks, (120 U. S. 678, 685, 689; 30 L. ed. 766, 768, 769; 7 Sup. Ct. Rep. 656, 763);

Smiley v. Kansas, (196 U. S. 447, 455, ante 289; 25 Sup. Ct. Rep. 289);

United States v. Ju Toy, (Vol. 25, Sup. Ct. Rep. 646; 198 U. S. 253);

Illinois Central R. R. Co. v. McKenvree, (27 Sup. Ct. Rep 153; 51 L. ed);

Chicago, M. & St. P. Ry. Co. v. Westby, (178 Fed. Rep. 632);

Brooks v. Southern Pac. Co., (148 Fed. Rep. 995);

Brooks v. Southern Pac. Co., (148 Fed. Rep, 996);

Howard v. Illinois Cent. R. Co., (148 Fed. Rep. 1003);

McCabe v. Atchison T. & S. F. Ry. Co., (186 Fed. Rep. 987);

Cella Commission Co. v. Bohlinger, (147 Fed. Rep. 425);

Karen v. United States, (121 Fed. Rep. 259, 260).

In the cases of *United States v. Harris*, and *Baldwin v. Franks, supra*, this Honorable Court passed on Section 5519 of the Revised Statutes, which section, by its terms, covered conspiracies by white or other persons against white persons, as Section 2145 in the case at bar covers offenses by white persons against white persons. In both these cases for the reason that Section 5519 covered more than was within the constitutional powers of Congress to enact, the Court held that the section could not be sustained and was invalid and unconstitutional as a whole.

In *United States v. Reese, supra*, an attempt was made to limit the statute by construction, so as to make

it operate only on that which Congress might rightfully prohibit and punish. But in disposing of this contention the Court held that the unconstitutional part could not be rejected in order to retain the constitutional part; that the section must stand or fall as a whole; that words of limitation cannot be introduced into a penal statute, "so as to make it specific when as expressed, it is general only." The Court further remarked: "To limit this statute in the manner now asked would be to make a new law, not to enforce an old one."

In the *Trade-Mark cases, supra*, it was claimed that as Congress had the power to regulate trade marks used in commerce with foreign nations and among the several states that Sections 4 and 5 of the Act of August 14, 1876, C. 27, (19 St. 141) might be held valid in that class of cases even though the act covered other classes not within the power of Congress to regulate. The Court held otherwise, saying:

> "It is not within the judicial province to give the words used by Congress a narrower meaning than they are manifestly intended to bear."

The point under consideration was also very carefully considered in *Chicago, Milwaukee & St. Paul Ry. Co. v. Westly, supra*, a case in which the validity of a statute covering by its terms a class of employees constitutionally exempted together with another class not so exempted. In referring to the attempt to eliminate the unconstitutional part in order to save the remainder, the Court said:

> "That result can be attained only by introducing into the statute words of limitation, which would expressly restrict the general terms 'every common carrier' and 'any employee' to common carriers using dangerous power and machinery and their employees engaged in dangerous occupations about them, a species of legislation, the Courts are without power to enact." * * * The Statute cannot be restricted lawfully by construction to the constitutional class because the part applicable to that class is not separable from that part applicable to the unconstitutional class so that each may be read and stand by itself."

As was aptly said by the Court, speaking by the Honorable Chief Justice, in *United States v. Reese, supra:*

> "It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who shall be rightfully detained and who shall be set at large. This would, to some extent, substitute the judicial for the legislative department of the government."

In the comparatively recent case of *Illinois C. R. Co. v. McKendree, supra,* December, 1906, this Court reviewed the earlier cases establishing the rule of interpretation herein stated and without hesitation re-affirmed and approved the rule as herein stated. In this case, the Secretary of Agriculture made an order concerning

quarantine regulations which included in its terms intrastate as well as interstate commerce. The Court speaking through Honorable Justice Day, while conceding the right of the Secretary to make such a regulation, if confined in its terms to its proper scope, said:

> "Nor have we the power to so limit the Secretary's order as to make it apply to only interstate commerce, which it is urged is all that is here involved. For aught that appears upon the face of the order, the Secretary intended it to apply to all commerce, and whether he would have made such an order, if strictly limited to interstate commerce, we have no means of knowing. * * * We think these principles (referring to the earlier cases) apply to the case at bar, and that this order of the Secretary * * * is single in character and includes commerce wholly within the state thereby exceeding any authority which Congress intended to confer upon him."

Upon the authority of the foregoing cases so clearly and uneqivocally establishing the principle, we believe we are warranted in stating that Congress never intended by Section 2145 to take the laws providing for the punishment of crimes in places within the sole and exclusive jurisdiction of the United States and apply them to a place like an Indian Reservation within an organized state where such laws would apply only in part and to a very limited extent. It was the clear intention of Congress to apply such laws to "Indian Country" like Indian

Territory, country within the sole and exclusive jurisdiction of the United States and where the law would apply as a whole and not country over which the civil and criminal jurisdiction of the respective states extend and which jurisdiction is guaranteed them by the Federal constitution, and which jurisdiction, Section 2145, in terms interfers with and attempts to destroy. It would be a clumsy method of legislating, a method upon which this Court has often placed its stamp of disapproval, for the reason, among other things, that it would be judicial legislation to give effect to such laws.

It is only by overruling all of the above cited cases that the Federal courts can be given jurisdiction of the case at bar, which involves, "An offense committed by a citizen against the person of an Indian on an Indian Reservation within the limits of a state.

Navigability of Klamath River and State Ownership of Bed Thereof

(a) Act of March 11, 1891, Not Conclusive As to What Streams Are Navigable in California.

The act of March 11, 1891, chap. 92 (*Political Code*, Sec. 2349) of California among other things provides:

> "The following streams and waters are declared public ways: . . . all streams and sloughs emptying into Elk River."

Referring to the south fork of Elk River a stream covered by the above provision, the Supreme Court of

California in *People v. Elk River M. & L. Co.* (107 Cal. 224) said:

> "If the stream is in fact non-navigable, it is not a public way, and the legislature cannot make it such by merely enacting a law declaring it navigable."

The act then is not conclusive as to what rivers are navigable or non-navigable under the laws of California. For by what legal reasoning can it be shown that an act which cannot make a non-navigable stream, navigable that it can nevertheless make a navigable stream, non-navigable. *Cardwell v. County of Sacramento* (79 Cal. 347) as interpreted by this Honorable Court in its opinion in the case at bar is not the law of the State of California and if the opinion interprets the case correctly, it has been overruled by *People v. Elk River, etc., supra.*

The law of California is the same as that of the other states as to the effect of acts declaring streams navigable. As was said in *Railroad v. Ferguson* (105 Tenn. 552, 59 S. W. 343), quoting from *Little Rock, etc. R. R. Co. v. Brooks* (39 Ark. 403, 43, Am. Rep. 277):

> "It does not require legislative sanction of either Congress or of the state to give a stream a navigable status."

In *Martin v. Bliss* (32 Am. Dec. 52) the Court answered the contention that an act of the legislature was necessary to give a stream a navigable status, in this

language, the principle of which we adopt, but not the sarcasm:

> "Nature is competent, we imagine, to make a navigable river without the help of the legislature."

The latest expression of the Supreme Court of California on the point in question is:

> "And the question whether or not there is such navigable waters over such land, must, in the meantime remain open as a question of fact." *Forestier v. Johnson, supra,* (44 Cal. Dec. 480, October 1, 1912.)

(b) If a Statute Declaring River a Public Highway Is Repealed and by Such Repeal the Use of the River as a Public Highway Is Abandoned the State Holds Title to the Bed of the River as a Proprietor and the Boundaries of the Riparian Owners Are Not Extended to the Center Thereof.

The Klamath River was declared navigable in the act of April 23, 1880, ch. 122, of the legislature of California. If that act had any efficacy, such as the opinion holds, it would make this river a navigable stream and would vest the State of California with the title to the bed thereof. Having once become the owner of the title to bed of the stream no act of the legislature declaring the stream non-navigable could divest the state of its title to the bed of the stream. The greatest possible effect such an act could have, would be in accordance with the principle laid down in *People v. Kerber* (152 Cal. 735).

That case recognizes that the legislature might by some lawful act discontinue or abandon the use of navigable water in so far as the public is concerned. But as to the effect on the title, the Court said:

> "If the title at that time is held by the state, it will thereafter *hold it as a proprietor* and not as a public agent or sovereign in charge of a public use."

This is beyond question the law of California on this subject and it is not the law of that state that "by the acts * * *—act 1850 * * * and "the acts of February 24 and March 11, 1891, declaring in effect that the Klamath River is a non-navigable stream—California has vested in the United States as riparian owner, the title to the bed of the Klamath, if in fact it be a navigable river." (See Opinion p. 10). The only effect that could be produced would be that the state would hold the title thereafter in its *proprietary* and not its sovereign capacity.

The Supreme Court of the State of Iowa in four cases passed on the effect of the repeal of an Act of Congress dated August 8, 1846, declaring the Des Moines River to be navigable. After the repeal of the act various persons and corporations attempted to assert private ownership to the bed of the stream. In one case a person claimed the right to quarry stone from the bed of the river, in another case, the right was claimed to construct a railroad along the bed of the river, while in still another the right to cut ice was involved. The

theory advanced and which the Court steadfastly held against was that by the repeal of the Act of 1846, the riparian owners were vested with the title to the bed of the Des Moines river. The Court in holding against this contention in these four cases, said:

> "This repealing act did not invest riparian owners with the title to the middle of the stream. The boundaries of their land were not extended thereby."
>
> "They claim an extension of boundary, but only as an incident to the act of Congress declaring the stream non-navigable. We have been unable to discover any authority or principle upon which we could hold that the act had that effect. The case is somewhat like that of the vacation of a street. The boundary of the land abutting on the street is not changed. If the adjacent owner was the owner of the fee to the middle of the street he would of course enjoy whatever benefit there might be in the extinguishment of the public easement. But if he was not the owner of such fee the vacation of the street would not confer it. In respect to a riparian proprietor, we think that this, and this only, can be said. While the stream is navigable his riparian rights are subject to the public right of navigation. After it is declared non-navigable they are not."

The four cases are as follows, to-wit:

Chic v. Porter, 72 Iowa, 426, 34 N. W. 288.

Serrin v. Grefe, 57 Iowa, 196, 25 N. W. 227.
Steele v. Sanchez, 72 Iowa, 65, 33 N. W. 367.
Wood v. Chicago, 60 Iowa, 465, 15 N. W. 285.

(c) The Constitution of California Prevents Gift of State Property, Such as Would Result if by Repealing Act Declaring Stream Navigable Boundaries of Riparian Owners Are Extended to the Center of the Stream.

One of the principal reasons why California has not vested "in the United States, as riparian owner, the title to the bed of the Klamath," (Opinion P. 10) by the repeal of the act of April 23, 1880, declaring it navigable is that it is provided by Art. IV Sec. 31 of the Constitution of California, that a gift of state property cannot be made by the legislature. Said Section 31 limits the power of the legislature in this particular as follows:

> "Nor shall it have power to make any gift, or authorize the making of any gift, of any public money or thing of value to any individual, municipal or other corporation whatever."

The Supreme Court of California referred to this provision of the state constitution in the case of *People v. Kerber, supra*, where in passing on attempt of private individuals to get title to the land between ordinary high water mark and the line of the seawall, the Court said, among other things:

> "Other constitutional provisions prevent the

> gift of any state property by the legislature. (Art. IV, Sec. 31.)"

Therefore, if the Klamath River is in fact navigable or was made navigable by the act of April 23, 1880, ch. 122, California by reason thereof was and became the owner of the bed of the stream. The legislature then, was absolutely without power, by repealing the act to make the riparian owners a gift of the bed of the stream, as would result if it were held that by the repeal of the act, their lines were extended to the center of the stream.

Referring to the title of the soil beneath navigable waters the Court in *Forestier v. Johnson, supra,* said:

> "The title to the soil beneath such waters. . . . . belongs to the respective states by virtue of their sovereignty."

The Supreme Court of California also distinctly held in said case of *Forestier v. Johnson* that where, by the establishment of a harbor line or seawall, the use or public easement between it and the shore is destroyed, that thereupon the state may sell such portion over which such use or easement is abandoned. This recognizes the ownership of the state as a proprietor and that the *boundaries* of the *riparian owners are not extended* by the *destruction of the public easement.*

The main point decided in this last mentioned case was that if the state should sell its title to the soil beneath navigable waters and issue a patent to the same to a private individual, that such patent and such title

is always subject to the paramount right of the people to the use of such waters for the purposes of commerce, fishing, and hunting.

Navigablitiy of the Klamath River Important to the National Government, Indians and Public.

The navigability of the Klamath River is purely and simply a question of fact. This question is of vital importance to the United States and to the Indians with allotments on its banks. For the United States owns thirty billion feet of timber in the Klamath National Forest and tributary to the Klamath River, and the principal value of the Indian allotments on said river is for timber. The natural and only practical way for removing this timber will be by shipping the lumber in lumber vessels or by rafting or driving down this river. In addition to the thirty billion feet owned by the Government, there is six billion feet owned by private individuals, including the Indian Allotments, tributary to the Klamath.

See the Report and Map filed in the U. S. Department of Agriculture by the Forest Service, June 10, 1911, and effective July 1, 1911. This official report and map show the amount of the timber cruised by United States government officials and the importance of not disturbing the right of navigation on the Klamath.

Photographic copies of the plat of Township 11, North Range 3 East H. M. and of the section covering the *locus in quo* are attached to the last pages hereof. These photographs are of the original plat of said

Township on file in the Land Office at Eureka, California, an exact duplicate of which is on file with the Land Department, Washington, D. C. The copy of the sections (Trans. p. 37, Brief of Plaintiff in Error p. 24) covering the *locus in quo* is on the same scale as the said original plat of the Township. These maps show the meanderings and the comparative width of the river at the point of the alleged crime and that it is a stream of considerable magnitude.

The importance of this river and its basin is clearly shown in Volume III, Water Resources of California, published by the Department of the Interior in 1913 in co-operation with the State Water Commission of California. Pages 800 to 918 inclusive are devoted to water gaugings taken on said river and its numerous tributaries. On page 836 of said Volume III is a report showing that the lowest amount of water found running in the Klamath 10 miles above the mouth and 15 miles below the *locus in quo* was 3770 cubic feet per second and the largest amount 38,800 cubic feet per second. The Klamath has four tributaries denominated rivers: The Trinity, the Salmon, the Scott and Shasta Rivers and all flowing into the Klamath above the *locus in quo*. The Trinity is 60 miles long, the Salmon 46 miles long, the Scott 68 miles long, the Shasta 40 miles long. (See pages 177, 197, 200, 221, Part III, Gazetteer of Surface Waters of California, Dept. Int. U. S. Geol. Survey.) Besides these rivers there are innumerable creeks and other streams contributing to its flow. It drains 11,800 square miles or 7,552,000 acres of territory (see page 110, Part III Gazetteer Sur-

face Waters, *supra*), and 25 miles above its mouth must in the nature of things be navigable and useful in the future in assisting in carrying to the ocean below at least the greater portion of the thirty-six billion feet of standing timber that now adorns its banks and those of its tributaries.

This Honorable Court has frequently called attention to the importance of maintaining navigable waterways for the future use of the public, and with wise precision has defined what constitutes a navigable stream. In tht *Montello* case, (Vol. 20, Wall. p. 439), the Court said:

> "This Court held in the case of the Daniel Ball, that those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used or are susceptible of being used, as highways for commerce over which trade and travel are or may be conducted in the customary modes of trade and travel on water."

The Court further says in the same opinion and on page 441:

> "And independently of the Ordinance of 1787 declaring the 'navigable waters' leading into the Mississippi and St. Lawrence to be 'common highways,' the true test of the navigability of a stream does not depend on the mode by which commerce is or may be conducted, nor the difficulties attending navigation. If this were so, the public would be deprived of the use of many

> of the large rivers of the country over which *rafts of lumber* of great value are constantly taken to market. . . . The capability of use by the public for purposes of transportation and commerce affords the true criterion of the navigability of a river, rather than the extent and manner of that use. If it be capable in its natural state of being used for purposes of commerce, no matter in what mode the commerce may be conducted, it is navigable in fact, and becomes in law a public river or highway."

Plaintiff in error earnestly contends that the decision in the case at bar is at variance with former decisions of this Honorable Court and also at variance with the laws of California covering navigable streams and the title of the state to the beds thereof and that the decision if adhered to, will create confusion as to what are navigable waters and as to what are the rights of the state and riparian owners respectively in the soil beneath such waters.

Wherefore plaintiff in error respectfully asks that this petition be granted.

Dated May 23, 1913.

PUTER & QUINN,
Attorneys for Plaintiff in Error.

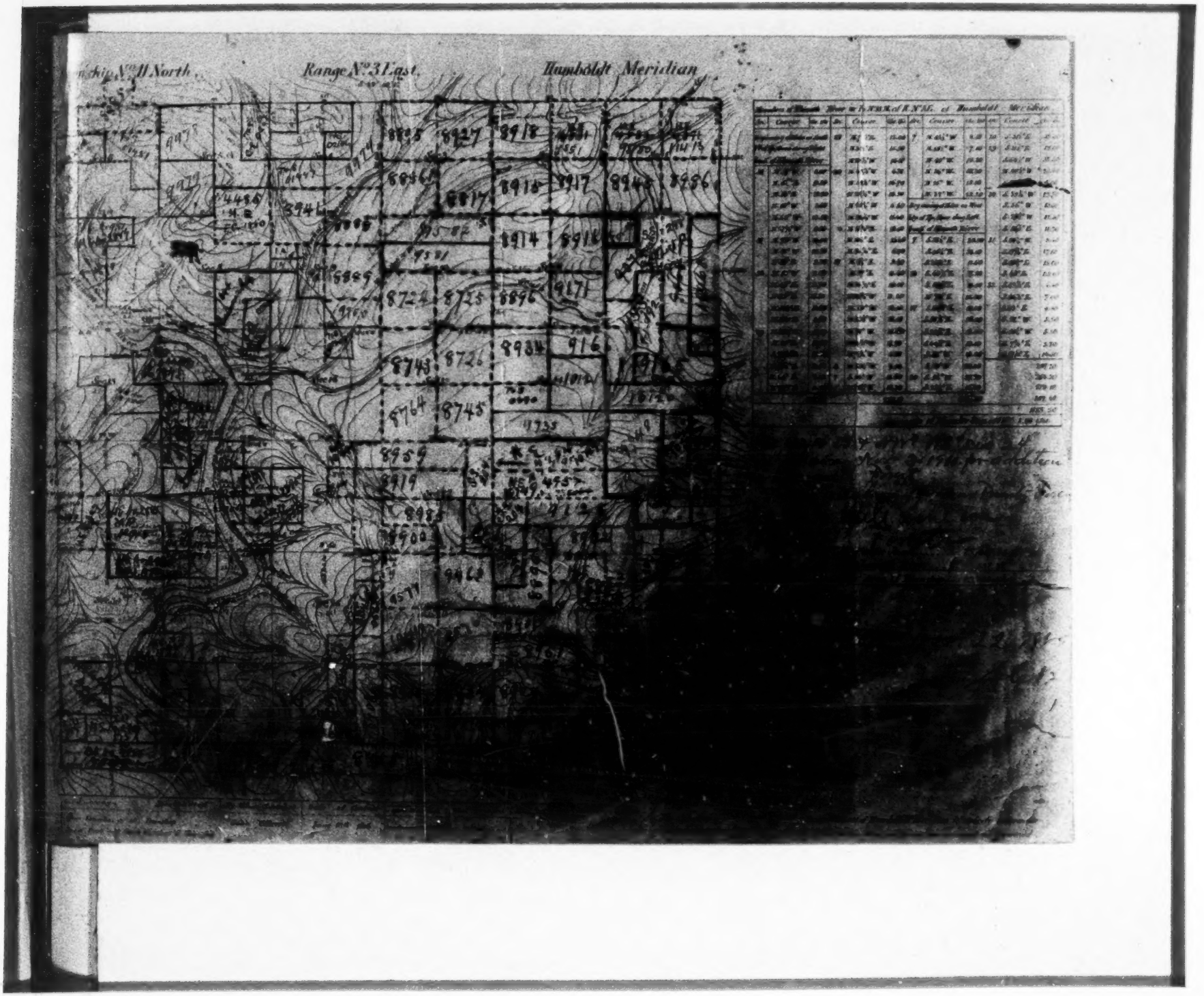
I, L. F. PUTER, of counsel for the Plaintiff in Error, herein do hereby certify that in my judgment the foregoing Petition for a Re-Hearing is well founded in point of law and that the same is not interposed for delay.

L. F. Puter.

Klamath
Indian Village
Creek
Section

Photographic Copy of United States Land Office Plat Showing Klamath River at Johnson's Store and Wauteck Village, Scene of Alleged Crime. (Photograph same scale as Original Plat.)

Photographic Copy of United States Land Office Plat Township 11 North Range 2 East, H. M. (Scale smaller than Original Plat.)


Range No. 3 East.
Humboldt Meridian